

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

253

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 24,837

Emil P. Taxay, M.D.

Petitioner

v.

John H. Shaffer, Administrator of the
Federal Aviation Administration;
Peter V. Siegel, M.D., Federal Air
Surgeon; Federal Aviation Administration;
Harry M. Faulkner, M.D., Regional
Flight Surgeon, Southern Region,
Federal Aviation Administration

Respondents

BRIEF FOR PETITIONER

AND APPENDIX

United States Court of Appeals
for the District of Columbia Circuit

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ISSUES PRESENTED FOR REVIEW

1. Is the letter of John H. Shaffer, Administrator of the Federal Aviation Administration (hereinafter "FAA") a reviewable order within the meaning of Section 1006 of the Federal Aviation Act of 1958, as amended, [49 U.S.C. §1486] (hereinafter "the Act")?
2. Is the Administrator of FAA required to establish standards concerning the designation and acceptable conduct of Aviation Medical Examiners and has he failed to do so?
3. Does the Administrator's refusal to provide Petitioner a hearing constitute a denial of administrative due process?
4. Is the Administrator's refusal to provide such a hearing within the discretion granted to him by Section 1002 of the Act [49 U.S.C. §1482]?

This case has not previously been before this Court.

REFERENCE TO RULINGS

The Order presented for review by this Court is the Order of FAA dated October 23, 1970, signed by John H. Shaffer, Administrator of FAA, which dismissed Petitioner's complaint. It is found at page 1 A of Petitioner's Appendix.

STATEMENT OF THE CASE

A. Preliminary Statement

In this proceeding, Petitioner asks the Court to review and set aside the Order of FAA (Appendix, page 1 A), and remand the matter to FAA with instructions to afford Petitioner the relief requested in that complaint, namely an evidentiary hearing concerning the FAA Administrator's refusal to renew your Petitioner's designation as an Aviation Medical Examiner.

1. The Administrative Proceedings

Proceedings were commenced before FAA on July 8, 1970 with the filing of Petitioner's formal complaint. This complaint was filed pursuant to Section 1002(a) of the Federal Aviation Act of 1958, as amended (hereinafter referred to as "the Act"), 49 U.S.C. §1482(a), which provides:

(a) Any person may file with the Administrator or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator or the Board to investigate the matters complained of. Whenever the Administrator or the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing. In the case of complaints against a member of the Armed Forces of the United States acting in the performance of his

official duties, the Administrator or the Board, as the case may be, shall refer the complaint to the Secretary of the department concerned for action. The Secretary shall, within ninety days after receiving such a complaint, inform the Administrator or the Board of his disposition of the complaint, including a report as to any corrective or disciplinary actions taken.

The complaint alleged that Harry Faulkner, M.D., Regional Flight Surgeon for the Southern Region of the FAA, under authority delegated to him by the Administrator, acted in contravention of Section 314(a) of the Act [49 U.S.C. §1355(a)] and Section 183.15 of the Federal Aviation Regulations [14 C.F.R. §183.15] by arbitrarily refusing to renew Petitioner's designation as an Aviation Medical Examiner without informing Petitioner of the charges against him or affording Petitioner the opportunity to rebut those charges. Furthermore, it was alleged that Peter V. Siegel, M.D., Federal Air Surgeon for the FAA, under authority delegated by the Administrator, acted in contravention of Section 314(a) of the Act [49 U.S.C. §1355(a)] and Section 183.15 of the Federal Aviation Regulations [14 C.F.R. §183.15] by arbitrarily refusing to renew Petitioner's designation as an Aviation Medical Examiner, on reconsideration of Dr. Faulkner's action, without affording Petitioner the opportunity to rebut the charges leveled against him. Moreover, the complaint alleged that Dr. Faulkner, Dr. Siegel, and John H. Shaffer, Administrator of the FAA, acted in contravention of Section 314(a) of the Act [49 U.S.C. §1355(a)] and Section 183.15

of the Federal Aviation Regulations [14 C.F.R. §183.15] by refusing to renew Petitioner's designation as an Aviation Medical Examiner as a means of punishing him for activities which Petitioner was never advised were considered improper by the Administrator or his designated representatives. Finally, the complaint alleged that the interpretation of the role of the Aviation Medical Examiner exhibited by the conduct and words of Dr. Faulkner, Dr. Siegel and other representatives of the Administrator with regard to the expert testimony of Aviation Medical Examiners in hearings before the National Transportation Safety Board has no basis in the statutory authority of Section 314(a) of the Act [49 U.S.C. §1355(a)] or in Subpart B of Part 183 of the Federal Aviation Regulations [14 C.F.R., Part 183, Subpart B] and constitutes an infringement of Plaintiff's constitutionally guaranteed right of free speech by denying renewal of his designation and, thus, punishing him for exercising that right.

Section 601 (a) of the Act [49 U.S.C. §1421(a)] provides:

(a) The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

- (1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;
- (2) Such minimum standards governing appliances as may be required in the interest of safety;
- (3) Reasonable rules and regulations and minimum standards governing, in the interest of safety,

(A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances;
(B) the equipment and facilities for such inspection, servicing, and overhaul; and
(C) in the discretion of the Administrator, the periods for, and the manner in which, such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Administrator may accept in lieu of those made by its officers and employees;

(4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interest of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedures, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

Section 183.15 of the Federal Aviation Regulations provides:

§183.15 Duration of certificates.

(a) Unless sooner terminated under paragraph (c) of this section, a designation as an Aviation Medical Examiner is effective for 1 year after the date it is issued, and may be renewed for additional periods of 1 year in the Federal Air Surgeon's discretion. A renewal is effected by a letter and issuance of a new identification card specifying the renewal period.

(b) Unless sooner terminated under paragraph (c) of this section, a designation as a Flight Standards Designated Representative is effective for one year after the date it is issued and may be renewed for additional periods of one year in the Administrator's discretion.

- (c) A designation made under this subpart terminates--
 - (1) Upon the written request of the representative;
 - (2) Upon the written request of the employer in any case in which the recommendation of the employer is required for the designation;
 - (3) Upon the representative being separated from the employment of the employer who recommended him for certification;
 - (4) Upon a finding by the Administrator that the representative has not properly performed his duties under the designation;
 - (5) Upon the assistance of the representative being no longer needed by the Administrator; or
 - (6) For any reason the Administrator considers appropriate.

The FAA dismissed this complaint by letter from John H. Shaffer, Administrator, dated October 23, 1970 (Appendix, page 1 A).

2. Proceedings before this Court

The Petition for Review by this Court was filed on November 25, 1970.

The matter is before this Court pursuant to Section 1006(a) of the Act [49 U.S.C. §1486(a)] which provides:

- (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Section 1005(f) of the Act [49 U.S.C. §1485(f)] requires that an Order of the Administrator set forth supporting findings of fact as follows:

(f) Every order of the Administrator or the Board shall set forth the findings of fact upon which it is based, and shall be served upon the parties to the proceeding and the persons affected by such order.

Furthermore, Sections 1006(d) and (e) of the Act [49 U.S.C. §§ 1486 (d) and (e)] set forth the power of the reviewing court and the standards of judicial review:

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

B. The Facts

1. The Parties

The Petitioner, Emil P. Taxay, M. D., is currently practicing medicine in Miami, Florida. He is a Diplomate of the American Board of Internal Medicine and specializes in both internal medicine and cardiology. He is on the staff of four hospitals in the Miami area and has served on the faculty of the University of Miami School of Medicine, both as an instructor and assistant professor. Petitioner holds membership in a number of local, national and international medical associations and has published over twenty articles in medical journals. He served four years active and nine years reserve duty as a flight surgeon with the United States Air Force. A copy of Petitioner's curriculum vitae can be found in the Appendix at pp. 17A-23A.

Petitioner was originally designated as a Senior Aviation Medical Examiner by the FAA on August 7, 1961. In this capacity he has examined approximately 100 airmen a year to determine their qualifications for medical certification by the FAA pursuant to Part 67 of the Federal Aviation Regulations [14 C. F. R., Part 67]. Petitioner has never been advised by the FAA that his work in this regard was unsatisfactory. In fact, FAA representatives have noted the acceptable quality of his work (Appendix p. 51A). To his credit, Petitioner has attended all required

refresher courses in aviation medicine and for several years has voluntarily participated in the FAA-sponsored Air Traffic Control Program and the FAA-sponsored Accident Investigation Program. Petitioner conducted activities pursuant to said designation up to the time that he was notified that said designation would not be renewed and that his functions as an Aviation Medical Examiner would terminate on March 30, 1970.

Respondent, John H. Shaffer, is the Administrator of the FAA, an administrative agency established pursuant to Section 301 of the Act [49 U. S. C. §1341] and placed within the Department of Transportation pursuant to Section 3(e) of the Department of Transportation Act [49 U. S. C. §1652(e), Supp. V]. It is the function and duty of the Administrator to exercise and perform those powers and duties which Congress has set forth in the Act [Section 313 of the Act, 49 U. S. C. §1354].

Respondent, Peter V. Siegel, M. D., is the Federal Air Surgeon, an FAA employee to whom the Administrator has delegated his authority under Section 602 of the Act [49 U. S. C. §1422] to issue or deny airman medical certificates. This delegation of authority is contained in Section 67.25 of the Federal Aviation Regulations [14 C. F. R. §67.25] and applies as well to authorized representatives of the Federal Air Surgeon within the FAA such as Respondent, Harry Faulkner, M. D., a Regional Flight Surgeon, and to Aviation Medical Examiners. The

Administrator has also delegated his power to choose properly qualified private physicians to examine airmen (for the purpose of issuing or denying medical certificates) as provided in Section 314(a) of the Act [49 U. S. C. §1355(a)] to the Federal Air Surgeon or his authorized representative within the FAA pursuant to Section 183.11 of the Federal Aviation Regulations [14 C. F. R. §183.11].

2. Background for this proceeding.

On March 29, 1970, Petitioner received a letter from Respondent, Harry Faulkner, M.D., Regional Flight Surgeon for the Southern Region of FAA, dated March 25, 1970, notifying Petitioner that his designation as an Aviation Medical Examiner would not be renewed and that his function as such would terminate on March 30, 1970 (Appendix, p. 24A). Dr. Faulkner stated that "we" had reviewed Petitioner's record of activity as a designated Aviation Medical Examiner and that "the decision had been reached that it would not be in the best interest of the Federal Aviation Administration to reappoint [him] as an Aviation Medical Examiner." No other reason was given, nor was Petitioner informed as to who made the decision or on what basis that decision was reached.

On March 30, 1970, Petitioner engaged the undersigned, Robert D. Powell, Esquire, to aid him in attempting to regain his designation. On

April 6, 1970, Mr. Powell wrote to Respondent Peter V. Siegel, M. D., to request reconsideration of Dr. Faulkner's action and that a meeting be arranged to explore the situation (Appendix, pp. 25A-26A). On April 7, 1970, Mr. Powell wrote to Dr. Faulkner requesting a definite statement of the reasons for Dr. Faulkner's refusal to renew Petitioner's designation (Appendix, p. 27A). Mr. Powell's letter to Dr. Faulkner was apparently referred to J. N. Coker, Esq., Regional Counsel for the Southern Region of FAA, for reply. In response to the request for a definite statement of reasons, Mr. Coker stated, "It is believed that you and Dr. Taxay are aware of the reasons for such determination." (Appendix, p. 28A). Mr. Coker's main concern seemed to be the possibility of litigation (Appendix, p. 28A, last paragraph).

Because Petitioner considered Mr. Coker's letter no explanation at all, Mr. Powell wrote to Mr. Coker again on April 13, 1970 to request a specific description of the reasons for Dr. Faulkner's refusal to renew Petitioner's designation (Appendix, pp. 29A-30A). Mr. Coker replied, by letter dated April 20, 1970, that Petitioner was denied renewal because he has participated as an expert medical witness in contested medical certification hearings before the National Transportation Safety Board in opposition to the position adopted by the Administrator while identifying himself as a designated representative of the Administrator and because he has served as a consultant to

Mr. Powell on certain other contested cases (Appendix, p. 31A).

Dr. Siegel exhibited this same attitude in a letter to Mr. Powell dated April 24, 1970, wherein he stated: "I do not need to go into great detail with you since you know it is difficult for an individual to both serve as a representative of the Administrator and as a representative against the Administrator." (Appendix, p. 32A). No mention was made of Mr. Powell's request for a meeting. Dr. Siegel also wrote to Petitioner on April 24, and charged him with serving on a regular basis as a paid consultant to attorneys opposing the Administrator (Appendix, p. 33A). Because Dr. Siegel did not mention a meeting in either of these letters, Mr. Powell wrote to him on May 1, 1970 to request again the opportunity to discuss the entire matter (Appendix, p. 38A). No response was ever received to either of the requests for a meeting.

Various officials and employees of FAA have discussed the agency's position on this matter in letters directed to United States Senators who had inquired about the situation at Petitioner's request. On April 9, 1970, James Rogers, Director of the Southern Region for FAA, wrote to the Honorable Spessard L. Holland (Appendix, pp. 34A-35A). Mr. Rogers' letter adds to the charges discussed, supra, the allegation that Petitioner was engaged in helping Mr. Powell develop a case against the Administrator on behalf of a pilot whom Petitioner supposedly knew

the Administrator did not feel was qualified for medical certification.

Mr. Rogers did not identify this pilot. However, Petitioner has testified on behalf of only two pilots in contested certification cases, once in October and once in December of 1969. In fact, all of his limited involvement in "contested" cases occurred prior to December of 1969.

Furthermore, Mr. Rogers alleged that Petitioner has written to individual airmen "taking the Administration to task" for denying such individuals medical certificates. According to Mr. Rogers, Petitioner "characteristically" failed to learn the facts on which FAA medical personnel based their actions in these unidentified cases. Mr. Rogers concludes that "we consider [Petitioner's] actions to represent a form of conflict of interest and to compromise his effectiveness as a designated representative of the Administrator."

The Administrator himself responded to an inquiry from the Honorable Edward J. Gurney, United States Senator, in a letter dated June 16, 1970 (Appendix, pp. 36A-37A). Therein, the Administrator recites the policy of the Department of Transportation that its employees may not take positions adverse to the Department in legal proceedings between the Department and third parties, except so far as their factual testimony is concerned. The Administrator states that he considers an Aviation Medical Examiner to be in a position analogous to that of an employee because he receives "a certain amount of training and information

and becomes privy to FAA's views on medical facts critical to its decisions." The Administrator concludes that this relationship involves a degree of trust and confidence. He goes on to say that because individual and public interest often collide in the area of airman medical certification, "no man can essentially occupy both sides." According to the Administrator, this is exactly what Petitioner has done as an organized course of conduct." However, it is interesting to note that the Administrator would not object to an Aviation Medical Examiner "occasionally taking an applicant's side in proceedings before FAA when he feels conscientiously impelled to do so in the interest of individual justice."

None of the correspondence from FAA officials discussed above has charged Petitioner with medical incompetence of any degree. Quite to the contrary, the Federal Air Surgeon candidly admitted that the FAA does not challenge Petitioner's qualifications (Appendix, p. 33A). Rather, the FAA has chosen to attack Petitioner's professional integrity by charging him with engaging in a conflict of interest situation. The damage this charge has caused to Petitioner's professional reputation is patent. Moreover, Petitioner has suffered economically as well. Pilots who had been obtaining FAA physical examinations from Petitioner for many years have been forced to go elsewhere. In doing so, they have removed not only Petitioner's FAA-related clientele, but also a substantial

portion of his "civilian" clientele comprised of those pilots' and their families' general medical care.

Because Petitioner believed that his position regarding the charges raised by the FAA had not been considered prior to the decision not to renew his designation, he authorized his attorney, Mr. Powell, to request a meeting with the Federal Air Surgeon or his representative in order to present his position prior to Dr. Siegel's reconsideration of the matter. As noted, supra, Mr. Powell made such a request on two separate occasions, but received no reply. However, Mr. Jennings Roberts, then Associate General Counsel of the Operations and Evaluations Branch of FAA, did request a meeting with Mr. Powell for the stated purpose of discussing possible legal action which Petitioner might bring against FAA. This meeting was held on May 8, 1970, in Mr. Roberts' offices. Present were Mr. Powell and his associate, Mr. Roberts, and Mr. John Marsh, also of FAA's Office of General Counsel. While Mr. Powell did attempt to present Petitioner's position at this meeting, the FAA representatives were not prepared to discuss the specific reasons for refusing to renew Petitioner's designation as an Aviation Medical Examiner. Rather, Mr. Roberts indicated that it was FAA's wish to put an end to Aviation Medical Examiners participating in any aviation medical case from a position favoring a pilot, except under subpoena. Mr. Roberts indicated that it was FAA's aim to deny a pilot

the assistance of a physician, skilled and recurrently trained in aviation medical matters. This type of expertise was to be retained by FAA so that it would be able to win more cases at the hearing level. This is similar to the position taken in the Administrator's letter to Senator Gurney (Appendix, pp. 36A-37A) and discussed, supra. On the other hand, Mr. Marsh stated that it was his understanding that FAA believed that Petitioner was acting as an Aviation Medical Examiner on specific cases, passing on them as a representative of the Administrator, and later appearing at a National Transportation Safety Board hearing on behalf of the pilot as a regular course of conduct. Mr. Powell offered to write a letter to Mr. Marsh explaining Petitioner's involvement in aviation medical cases, and Mr. Marsh accepted the offer.

Mr. Powell wrote such a letter on March 21, 1970 (Appendix, pp. 39A-43A). In that letter, Mr. Powell set forth the facts of Petitioner's involvement with contested aviation medical cases, and promised, on behalf of Petitioner, that if his designation were renewed, Petitioner would not appear as an expert in a case of pilot on whom he has performed the examination of a designated Aviation Medical Examiner, except under subpoena. Dr. Siegel responded by letter dated June 10, 1970 in which he stated that Mr. Powell's letter presented no new information that would lead him to designate Petitioner as an Aviation Medical Examiner (Appendix, p. 44A).

Since that time, counsel for Petitioner has been informed by a pilot who is unrelated to this matter that a physician employed by FAA's Office of Aviation Medicine in a high-ranking position has stated that there is a reason for FAA's decision to refuse Petitioner's designation other than the reasons already expressed. This reason was not described. If this is true, Petitioner is desirous of learning that reason.

Dissatisfied with that disposition of the matter, Petitioner addressed a Complaint to the Administrator pursuant to Section 1002(a) of the Act [49 U. S. C. §1482(a)], dated July 8, 1970 (Appendix, pp. 2A-16A). Said Complaint requested the Administrator to exercise the power granted to him by Section 1002(a) of the Act [49 U. S. C. §1482(a)] by compelling the Federal Air Surgeon to renew Petitioner's designation as an Aviation Medical Examiner; or, in the alternative, that the Administrator conduct an investigation of the circumstances surrounding Dr. Siegel's and Dr. Faulkner's refusals to renew Petitioner's designation by means of an evidentiary hearing at which Petitioner would have full opportunity to learn the true nature of the charges against him, to cross-examine witnesses presented by FAA, and to present his position concerning this matter through documentary and testimonial evidence. The Administrator dismissed this Complaint by letter dated October 23, 1970 (Appendix, p. 1A).

Following the Administrator's action of October 23, 1970,
Petitioner determined that the matter should be placed before this
Court.

ARGUMENT

POINT I

THE LETTER OF THE ADMINISTRATOR OF THE
FEDERAL AVIATION ADMINISTRATION,
DATED OCTOBER 23, 1970,
IS A REVIEWABLE ORDER WITHIN THE MEANING OF
SECTION 1006 OF THE FEDERAL AVIATION ACT OF 1958,
AS AMENDED

As noted previously, John Shaffer, Administrator of FAA, in response to the complaint filed on behalf of Petitioner herein, wrote a letter dated October 23, 1970 (Appendix, p. 1A) stating:

As we are of the opinion that the complaint does not contain facts which would warrant further investigation, we therefore consider this matter dismissed without the necessity for further action.

It has been noted that the instant Petition, filed pursuant to Section 1006 of the Act [49 U.S.C. §1486], seeks review of that action taken by the Administrator. Section 1006 speaks toward review by the court of "any order, affirmative or negative, issued by the ... Administrator under this Act" It is submitted that the Administrator's letter of October 23, 1970 (Appendix, p. 1A) is an order subject to such review. The scope of review and power of the reviewing court is set forth in Section 1006(d) of the Act [49 U.S.C. §1486(d)]. Therein, the court is authorized to:

affirm, modify, or set aside the order complained of, in whole or in part, and, if need be, to order further proceedings by the ... Administrator.

This Petition seeks to have the order set aside, and the matter remanded to the Administrator for further proceedings in the nature of an adjudicative hearing. It is contended that due process of law requires such a hearing, and this point will be covered infra. It is clear, then, that this Petition properly invokes the court's jurisdiction, and asks relief which is within the court's power to grant.

Petitioner is of the view that said letter of October 23, 1970, constitutes a reviewable order because it operates with a final effect upon the procedures available to Petitioner before FAA. The courts have adopted a pragmatic view in deciding questions concerning the existence of a reviewable order. The test applied might be summarized as whether the administrative action operates with final effect upon a particular individual, entity, or group. This Court has taken such a position. Environmental Defense Fund v. Ruckelshaus, No. 23,813 (D. C. Cir. January 7, 1971); Medical Committee for Human Rights v. Securities and Exchange Comm., U.S. App. D. C.____, 432 F.2d 659 (1970); Pan American World Airways, Inc. v. Civil Aeronautics Board, 129 U.S. App. D.C. 159, 329 F.2d 483 (1968).

The United States Supreme Court has spoken on this subject to the same effect in Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 416 (1942), wherein the Court stated: "The particular label placed upon it [the administrative pronouncement] ... is not necessarily

conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive."

Even prior to the CBS case, supra the Supreme Court adopted a flexible view as to what constitutes an order. For example, in American Federation of Labor v. NLRB, 308 U.S. 401, 408 (1940) the Court stated that:

Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgments of a court, and may be re-examined by courts under particular statutes providing for the review of "orders".

In Powell v. U.S., 300 U.S. 276, 285 (1937), the Court said that over-emphasis upon the mere form of the order may not be permitted to obscure its purpose and effect.

The First Circuit has had occasion to review, under Section 1006 of the Act [49 U.S.C. §1486], a denial of a complaint filed under Section 1002 of that Act in the case of Trailways of New England v. Civil Aeronautics Board, 412 F.2d 926 (1st Cir., 1969). Therein, that court held that the denial of the Section 1002 complaint constituted an order reviewable by the Court under Section 1006. Trailways, supra, at 931.

Petitioner notes, and asks this court to recall, a case currently before it, viz, International Navigators Council of America v. John H. Shaffer (No. 24,302). The issue raised in that case concerning reviewability of the Administrator's dismissal of a Section 1002 complaint is identical to the issue

herein. Perhaps by the time this matter is considered by the court, the issue will be academic.

It is posited that the Administrator's letter dated October 23, 1970 (Appendix, p. 1A), although not in the usual form of an "order", is in fact a reviewable order giving rise to this Court's jurisdiction under Section 1006 of the Act [49 U.S.C. §1486], as it is the last stage of the administrative process available to Petitioner. Petitioner would be calling for review of the decision not to renew Petitioner's designation as an Aviation Medical Examiner itself, but it is thought that since the order is devoid of any statements or reasons for denial of the complaint, and the record is similarly lacking, a remand to the FAA for a hearing would be more appropriate. The Court's attention is respectfully directed to Section 1006(e) of the Act [49 U.S.C. § 1486(e)], wherein it is stated that: "The finding of fact by the Administrator, if supported by substantial evidence shall be conclusive." It is apparent that the substantial evidence test may not be applied to this record because of its sparseness. Therefore, it is Petitioner's position that this court would be deprived of its jurisdiction to review the decision itself because of the vagueness of the record. Accordingly, it is requested that the case be remanded so that a full record can ultimately be presented for the court's review. For the purpose of further review, the Court is urged to retain jurisdiction over the record developed at hearing.

POINT II

THE ADMINISTRATOR HAS FAILED
TO ESTABLISH STANDARDS
CONCERNING DESIGNATION OF
AVIATION MEDICAL EXAMINERS

Section 314(a) of the Act [49 U. S. S. §1355(a)] provides the statutory authority for delegation by the Administrator of FAA of certain of his powers and duties to private persons. This section provides, in part:

(a) In exercising the powers and duties vested in him by this Act, the Administrator may, subject to such regulations, supervision, and review as he may prescribe, delegate to any properly qualified private person ...any work, business, or function respecting (1) the examination, inspection, and testing necessary to the issuance of certificates under title VI of this Act, and (2) the issuance of such certificates in accordance with standards established by him.

This section of the Act is the statutory basis for Part 183 of the Federal Aviation Regulations [14 C. F. R., Part 183]. Part 183 establishes the manner in which Aviation Medical Examiners are certified, establishes the duration of their certificates, and purports to outline their privileges and duties. For example, Section 183.11(a) [14 C. F. R. §183.11(a)] provides that the "Federal Air Surgeon, or his authorized representative within the FAA, may select Aviation Medical Examiners from qualified physicians who apply." No further standards for the selection of Aviation Medical Examiners are found in Part 183. Section 183.15(a) [14 C. F. R. §183.15(a)]

provides that a designation as an Aviation Medical Examiner is effective for one year and may be renewed for additional periods of one year "in the Federal Air Surgeon's discretion." However, a designation may be terminated within the one year period as provided in Section 183.15(c) [14 C. F. R. §183.15(c)]:

(c) A designation made under this subpart terminates —

- (1) Upon the written request of the representative;
- (2) Upon the written request of the employer in any case in which the recommendation of the employer is required for the designation;
- (3) Upon the representative being separated from the employment of the employer who recommended him for certification;
- (4) Upon a finding by the Administrator that the representative has not properly performed his duties under the designation;
- (5) Upon the assistance of the representative being no longer needed by the Administrator; or
- (6) For any reason the Administrator considers appropriate.

Pursuant to such a designation, an Aviation Medical Examiner may perform the functions authorized in Section 183.21 of the Federal Aviation Regulations [14 C. F. R. §183.21] which provides:

An Aviation Medical Examiner may —

- (a) Accept applications for physical examinations necessary for issuing medical certificates under Part 67 of this chapter;
- (b) Under the general supervision of the Civil Air Surgeon or the appropriate senior regional flight surgeon, conduct those physical examinations;
- (c) Issue or deny medical certificates in accordance with Part 67 of this chapter, subject to reconsideration by the Civil Air Surgeon or his authorized representatives within the FAA;

- (d) Issue student pilot certificates as specified in §61.61 of this chapter; and
- (e) As requested, participate in investigating aircraft accidents.

It is interesting to note that the section just quoted is found in Subpart C of Part 183 which is entitled "Kinds of Designations: Privileges." (emphasis added).

Part 183 of the Federal Aviation Regulations contains no statement of standards concerning the conduct of physicians who are designated as Aviation Medical Examiners. Yet, Section 601(a) of the Act [49 U.S.C. § 1421(a)] empowers the Administrator to establish at least minimum standards for such matters. Section 601(a) provides, in pertinent part:

(a) The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

* * *

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

Despite this statute, the Administrator has made no effort to establish any guidelines whatsoever concerning the conduct of Aviation Medical Examiners with regard to their appearance at National Transportation Safety Board hearings on behalf of pilots or their relationship with legal representatives of airmen. Clearly, Part 183 of the Federal

Aviation Regulations, discussed supra, is utterly barren in this regard. Nor does the "Guide for Aviation Medical Examiners," a document wholly internal to the FAA, provide any guidelines. Copies of pertinent pages of the "Guide" are attached hereto as Appendix pp. 45A-50A. The entire document is contained in the record filed herein by the FAA. In the first place, this document is dated June, 1970 and, therefore, could have had little bearing on the decision to refuse Petitioner redesignation which occurred in March, 1970. Nevertheless, assuming that the document is essentially the same as its predecessors, Petitioner contends that it offers no guidelines for Aviation Medical Examiners with regard to the issues raised by FAA in his case. The section thereof entitled "Legal Responsibilities of Designated Aviation Medical Examiners" is no more than a warning about potential civil liability for certification of unsafe airmen and about criminal liability for falsifying records (Appendix, p. 46A). Furthermore, the "Guide" does not inform designated Aviation Medical Examiners of standards for their conduct in any greater detail than does Part 183 of the Federal Aviation Regulations.

This "Guide" is a wholly internal document which has not been promulgated as a rule or regulation according to the standards for rule-making contained in the Administrative Procedure Act [5 U.S.C. §553]. Yet the "Guide" itself offers more than adequate reason for the establishment of standards by the Administrator for the selection, renewal of

designation, and conduct of Aviation Medical Examiners by noting the size of the program (Appendix, p. 46A). We are told that designated Aviation Medical Examiners review approximately 99% of the 475,000 applications for medical certification that are filed each year. In all fairness to the physicians who make up this work force, some standards are required whereby they may guide their conduct, since it is inevitable that out of that number of applicants, a significant portion will have physical defects and seek advice from their Aviation Medical Examiner.

In several recent cases, this Court has spoken of the obligation of an administrative agency to articulate criteria on which administrative decisions are based. For example, in Environmental Defense Fund, Inc. v. Ruckelshaus, No. 23, 813 (D. C. Cir. January 7, 1971), this Court noted the reason for requiring articulation of criteria.

We cannot assume, in the absence of adequate explanation, that proper standards are implicit in every exercise of administrative discretion.
(Slip Op., at 20)

In that case, this Court was concerned with "fundamental personal interests in life, health, and liberty" (Slip Op., p. 23). Certainly, Petitioner in the instant case has suffered a serious incursion into his personal liberty through deprivation of his opportunity to pursue aviation medicine, a significant portion of his chosen occupation. As this

1. See, Parker v. Lester, 227 F. 2d 708 (9th Cir., 1955).

Court noted:

To protect these interests from administrative arbitrariness, it is necessary, but not sufficient, to insist on judicial scrutiny of administrative action. For judicial review alone can correct only the most egregious abuses. Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible. Rules and regulations should be freely formulated by administrators, and revised when necessary. Discretionary decisions should more often be supported with findings of fact and reasoned opinions. (Slip Op., at 23-24)

In WHDH, Inc. v. Federal Communications Commission, No. 23, 159 (D. C. Cir. November 13, 1970), this Court stated a similar position.

The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course which tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination. (Slip Op., at 17-18)

The United States Court of Appeals for the Fifth Circuit has spoken directly to many of the problems raised herein in its opinion on an action by an unsuccessful applicant for a retail liquor store operator's license against the Mayor of Atlanta and others for deprivation of her civil rights in denial of her application. Hornsby v. Allen, 326 F. 2d

605 (5th Cir., 1965). There, Mrs. Hornsby, the appellant, alleged that, although she met the qualifications for a liquor license, her application was denied without a reason being given in contravention of her due process guarantees. The Court of Appeals stated that "the denial of a license is based on an adjudication that the applicant has not met those qualifications and requirements" for issuance of a license.

(Hornsby, supra, at 608) Further, the court stated that:

Since licensing consists in the determination of factual issues and the application of legal criteria to them - a judicial act - the fundamental requirements of due process are applicable to it. (Hornsby, supra, at 608)

One failing that the court noted in the Hornsby case was the fact that "Mrs. Hornsby was not afforded an opportunity to know, through reasonable regulations promulgated by the board, of the objective standards which had to be met to obtain a license." (Hornsby, supra, at 610). This failing, coupled with others, led the court to conclude that Mrs. Hornsby was deprived of due process of law.

Your Petitioner in the instant case is in a position analogous to that of Mrs. Hornsby. He has for nearly nine years enjoyed the privileges and performed the duties of a "licensed" Aviation Medical Examiner for the FAA. In March of 1970, he was informed that a decision had been reached that his retention of the "license" would not be in the best interest of the FAA (Appendix, p. 24A). Yet, nowhere in the Federal Aviation

Regulations or the "Guide for Aviation Medical Examiners," are standards for such retention published. Nor was Petitioner ever advised by the Regional Flight Surgeon, the Federal Air Surgeon, or the Administrator of FAA as to what those standards are or that his actions were considered to violate those standards. The only statement offered to date by any FAA official as to requirements for Aviation Medical Examiners vis-a-vis contested aviation medical cases is contained in the Administrator's letter to Senator Edward J. Gurney dated June 16, 1970 (Appendix, pp. 36A-37A). Not only was this letter not directed to Petitioner, but it was issued after the decision on renewal of Petitioner's designation had been reached.

Furthermore, the fact that the FAA has failed to enunciate the minimum standards suggested by Section 601(a) of the Act [49 U. S. C. §1421(a)] for conduct of Aviation Medical Examiners vis-a-vis contested aviation medical cases leaves this Court in the unenviable position of reviewing administrative action without any guidelines against which the Court might check that action. This appears to be exactly the situation to which this Court addressed itself in the Environmental Defense Fund and WHDH, Inc. cases, supra.

POINT III

DUE PROCESS OF LAW REQUIRED
A HEARING AT SOME STAGE OF
THE PROCEEDING AT THE
ADMINISTRATIVE LEVEL

We have quoted from Section 1002 of the Act [49 U.S.C. §1482], in other parts of this brief, but the relevant portion of the section can stand repetition for the sake of clarity under this most crucial point:

Any person may file with the Administrator or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator or the Board to investigate the matters complained of. Whenever the Administrator or the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing.

Two issues arise under the facts of this case when they are placed in juxtaposition with this section. First, whether due process of law required a hearing at some stage during the proceeding below; and, second, whether any restriction is placed upon this concept by virtue of Section 1002 of the Act [49 U.S.C. §1482].

A. The Requirement of a Trial-Type Hearing

In our factual set-up, we have introduced the Court to Dr. Taxay, and the fact that he has been denied redesignation as an Aviation Medical Examiner. We have noted that there are no real standards for the designation of Aviation Medical Examiners, published or unpublished. We further note that there are no standards set forth with regard to redesignation of an Aviation Medical Examiner. The only standards we have, and they are slightly better than no rules at all, are concerned with removal of a designation. In Section 183.15 of the Federal Aviation Regulations, it is stated that a certificate, the designation itself, terminates:

- (1) Upon the written request of the representative;
- (2) Upon the written request of the employer in any case in which the recommendation of the employer is required for the designation;
- (3) Upon the representative being separated from the employment of the employer who recommended him for certification;
- (4) Upon a finding by the Administrator that the representative has not properly performed his duties under the designation;
- (5) Upon the assistance of the representative being no longer needed by the Administrator; or
- (6) For any reason the Administrator considers appropriate.

Cited as authority for this section is Section 314 of the Act [49 U.S.C. §1355], which deals with delegation of the Administrator's responsibilities to private persons.

It is clear that points (1) through (3) of Section 183.15 would have

no applicability here. Point (4) would, but no such finding has been made. In fact, quite the opposite is true. What is significant here is that, under this point, it would be incumbent upon the Administrator to make a finding, and support it by substantial evidence. It is clear to us, and it is hoped the Court will agree, that the type of finding required here would be one made after a trial type hearing. The fifth point is inapplicable since it refers to a situation where a given geographical area is saturated with Aviation Medical Examiners and the services of some are no longer required. (See "Guide for Aviation Medical Examiners", Appendix, page 47 A).

Coming to the last point of Section 183.15, it is clear that it gives the Administrator unbridled discretion, the sort of discretion the courts have frowned upon many times in the past. The discretion referred to would permit the Administrator to avoid applying points (1) through (5), and in a secret proceeding, deprive an individual of due process of law.¹ When regarded in this manner, this section is clearly unconstitutional and beyond the authority granted by the Act. Federal Maritime Commission v. Anglo American Shipping Co., 335 F. 2d 255 (2d Cir. 1964); Peters v. Hobby, 349 U.S. 331 (1955); Greene v. McElroy, 360 U.S. 474 (1954).

The Greene Case, supra, offers strong support to Petitioner's position

1. See, Wiemann v. Updegraff, 344 U.S. 183, 192 (1952); Bratton v. Chandler, 260 U.S. 110, 114-115 (1922).

herein. In that case, Greene's security clearance was revoked by the Department of Defense Personnel Security Board, and, as a result, he lost his position as an engineer with a firm that depended on sensitive government work. During the post World War II period and up to the time of revocation, Greene had received security clearances on three separate occasions (Greene, supra at 476). Greene was informed of this action, presumably by letter, that the Board had decided "that access by [him] to contract work and information...would be inimical to the best interests of the United States". (Greene, supra., at 477-78). He was also informed that he could seek a hearing before the Industrial Employment Review Board. Greene chose this latter course, and appeared with counsel. Prior to the hearing, he was informed that his clearance had been revoked because of information indicating that between 1943 and 1947 he had associated with Communists, visited the Russian Embassy, and attended a dinner given by an allegedly Communist Front organization (Greene, supra., at 478).

At the hearing, Greene was questioned in detail about these activities. However, the government presented no witnesses, even though it was obvious that the Board relied on confidential reports that were never made available to Greene (Greene, supra, at 479). Following this hearing, the Board returned Greene's security clearance to him. Nevertheless, Greene's case was reviewed by the Secretary of the Navy and his clearance was again revoked, leading to Greene's discharge by his employer. And, again,

Greene was given a hearing, this time before the Eastern Industrial Security Board. This hearing was of the same ilk as the previous one, with Greene presenting evidence and witnesses, all of whom were cross-examined intensely in a manner which indicated that the Board had access to reports and statements of "confidential informants which were not made available to" Greene (Greene, supra, at 487). No witnesses were presented by the government. This Board affirmed the Secretary's action.

The Supreme Court stated perfectly clearly that a hearing alone is not enough where administrative action has such serious effects on an individual:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is true in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirement of confrontation and cross-examination". (Greene, supra, at 496)

Because the hearings granted to Greene did not conform to these principles of fair procedure, the Court held that the government was not "empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination".

(Greene, supra, at 508).

Your Petitioner in the instant case is in a position similar to that of Greene. He has been informed, in very vague terms, that he has placed himself in a conflict of interest situation that is inimical to the interests of FAA. Yet he has never been apprised of the exact circumstances or individual cases concerning which he is allegedly in conflict with FAA. Rather, officials of the FAA have implied that he has "sold out" to persons to whom the Administrator is opposed. Moreover, like Greene, he has been deprived of a significant portion of his livelihood. Further, he has spent nearly one full year in attempting to convince the FAA to listen to him, all to no avail. However, where Greene was at least granted hearings, albeit deficient ones, Petitioner has not been granted any reasonable opportunity to present his own position on these charges to the FAA. It appears that the Administrator and his representatives have reached decisions in Petitioner's case in a secretive manner, in contravention of Supreme Court mandates.

It is submitted that such a secret proceeding has been conducted here. It has been noted that what is complained about, the so-called "conflict of interest", occurred some time before the term of Dr. Taxay's redesignation. One might wonder why such a heinous piece of wrongdoing did not cause the Administrator to act under Section 183.15 of the Federal Aviation Regulations by terminating Petitioner's designation at once. The answer

is simple. Such action would have given rise to a hearing. It is obvious that the Administrator is desirous of avoiding this type of procedure. The Administrator must not be permitted to effectuate this subterfuge, for the interest satisfied by such action is not that of the public, and it is the public interest the Administrator is charged to guard.

From this cursory review of the few standards we have, it emerges as clear that the Administrator chose not the removal course of action, but refusal to renew, and in doing so applied wholly subjective standards and unbridled discretion. But unbridled discretion is a luxury no one can afford or permit to go unchallenged. A case in point is that of Goldsmith v. U.S. Board of Tax Appeals, 270 U.S. 117 (1925). In this case Goldsmith, a Certified Public Accountant, applied for admission to practice before the Board of Tax Appeals. The Board's Rules made eligible for admission any attorney at law admitted to any Federal or state court in the United States, as well as duly qualified C.P.A.'s. The rules went on to require that an applicant give an oath, provide his name, residence, qualification information, and whether he had been disbarred or had certification revoked. The rules stated further that the "Board may, in its discretion, deny admission to any applicant, or suspend or disbar any person after admission". (Goldsmith, supra, at 123). Goldsmith applied, was denied, and filed an action seeking mandatory relief. Simply stated, the issues before the court were whether or not Goldsmith was qualified to apply, and whether the

discretion alluded to in the Board's rules would obviate the necessity for a trial-type hearing. The Supreme Court found Goldsmith qualified, and found that the Board's action had deprived him of due process of law. The Court said that:

"the Board may in its discretion deny admission, suspend or disbar any person." But this must be construed to mean the exercise of a discretion to be exercised after a fair investigation, with such notice, hearing and opportunity to answer for the applicants as would constitute due process.
(Goldsmith, supra, at p. 123, emphasis added.)

That this case is appropriate for consideration on these facts is a foregone conclusion. What makes it stronger is that the Goldsmith case dealt with promulgated rules. In the instant situation we have none. As was Goldsmith, Petitioner is qualified to serve in the position which he seeks. He has been serving the Administrator well in that capacity for almost nine years. Yet the Administrator has made a wholly discretionary and, it is submitted, arbitrary decision to refuse renewal of his designation without affording Petitioner notice of the charges against him, or the opportunity to answer those charges at a hearing, and without supporting his decision with substantial evidence.

The recent case of Environmental Defense Fund v. Ruckelshaus, No. 23, 813 (D.C. Cir. January 7, 1971) should be examined from the point of view of administrative application of subjective or discretionary standards. For, in that case, in a situation where an administrative agency had not

developed standards, this Court pointed out that questions of balancing public and private interests should "be explored in the full light of public hearing and not resolved behind the closed doors of the Secretary." (Environmental Defense Fund, *supra*, slip op. at 15). This Court felt that "Public hearings bring the public into a decision making process, and create a record that facilitates judicial review." (Environmental Defense Fund, *supra*, slip op. at 17). Finally, this Court spoke directly to the problem at hand on pages 19-20 of the Slip Opinion:

Congress clearly intended to protect the public from some risks by summary administrative action pending further proceeding. The Administrator's problem is to determine which risks fall in that class. The Secretary has made no attempt to deal with that problem, either by issuing regulations relating to suspension or by explaining his decision in this case. If regulations of general applicability were formulated, it would of course be possible to explain individual decisions by reference to appropriate regulation. It may well be, however, that standards for suspension can best be developed piecemeal, . . . Even so, he has an obligation to articulate the criteria that he develops in making each individual decision. We cannot assume, in the absence of adequate explanation, that proper standards are implicit in every exercise of administrative discretion.

In Petitioner's case, we have no standards, and no attempt at standards, exactly the situation with which this Court was concerned in Environmental Defense Fund, *supra*.

The charge against Petitioner that is stated as the cause for which the Administrator refused to renew Petitioner's designation is a serious one.

He is charged with professional dishonesty, for he is charged with placing himself in a conflict of interest situation. There are serious professional ramifications to this charge, as well as economic impact. He has been given no chance to face his accusers, offer explanations, discuss facts, cross-examine witnesses or present witnesses in his own behalf. He was merely given the opportunity, through counsel, to write a letter to an attorney in the Administrator's office, setting forth some portion of his side of the story. In exchange he received a cursory note from the Federal Air Surgeon (Appendix, p. 44A). Petitioner has never had his say and is being deprived of due process of law.

The Court's attention is respectfully directed to a thorough exposition of the law on the subject matter at hand. We have reference here to K. Davis, Requirement of a Trial Type Hearing, 70 Harvard Law Review 193 (1956). Professor Davis, in this exhaustive work, covers the case law up until 1956 on this point. For the purpose of aiding the Court in further exploring the law, the Court's attention is further directed to the cases of Crocker v. U.S. 127 F. Supp. 568 (Ct. Cl. 1955); Parker v. Lester, 227 F. 2d 708 (9th Cir. 1955); Minkoff v. Payne, 93 U.S. App. D.C. 123, 210 F. 2d 689 (D.C. Cir. 1953); Columbia Autoloan v. Jordan, 90 U.S. App. D.C. 222, 196 F.2d 568 (D.C. Cir. 1952); Wieman v. Undergraff, 344 U.S. 183 (1952); In re Carter, 89 U.S. App. D.C. 310, 192 F. 2d 15 (1951), cert. denied 342 U.S. 862; In re Carter 85 U.S. App. D.C. 229, 177 F. 2d 75

(1949); Bratton v. Chandler, 260 U.S. 110 (1922).

The Fifth Circuit has offered a brief course on due process in administrative proceedings at page 608 of its opinion in Hornsby v. Allen, 326 F. 2d 605 (5th Cir. 1964). The court stated that:

Due process in administrative proceedings of a judicial nature has been said generally to be conformity to fair practices of Anglo-Saxon jurisprudence, see Tadano v. Manney, 160 F. 2d 665, 667 (9th Cir. 1947), which is usually equated with adequate notice and a fair hearing see Opp Cotton Mills v. Administrator, 312 U.S. 126, 61 S. Ct. 524, 85 L. Ed. 624 (1941). Although strict adherence to the common law rules of evidence at the hearing is not required, ... the parties must generally be allowed an opportunity to know the claims of the opposing party, Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773, 82 L. Ed. 1129 (1938), to present evidence to support their contentions, see id. 304 U.S. at 18, 58 S.Ct. at 776, 82 L. Ed. 1129, and to cross-examine witnesses for the other side, Reilly v. Pinkus, 338 U.S. 269, 70 S.Ct. 110, 94 L. Ed. 63 (1949).

It is submitted that examination of the facts of Petitioner's case reveals that the Administrator has observed none of these elements of administrative due process in his handling of the matter.

A recent lower court decision that contains some fine reasoning, and is of particular interest because it involves a physician, is the case of Citta v. Delaware Valley Hospital, 313 F. Supp. 301 (D.C. E.D. Pa. 1970). In this case, the plaintiff doctor was denied by the hospital board the authority to perform unsupervised gastrectomies in the hospital. Federal jurisdiction was founded upon the hospital's receipt of Federal funds. Plaintiff

originally came into court for a temporary restraining order, but was directed to exhaust his administrative remedies at the hospital. He did so and after an evidentiary hearing wherein he was represented by counsel, had a stenographic record, was allowed to appear and testify, present witnesses, and cross-examine witnesses, he returned to court claiming that due process required a hearing before he was restricted. The court found that as long as Plaintiff was afforded a hearing at sometime on this valuable property right, the practice of medicine, due process would be satisfied. The court did not require the hearing before the restrictions were imposed because due process may require different procedures under different circumstances. In this case, the plaintiff, though his practice would be limited by the hospital's preemptory action, was not dealt an economic death blow. The injury to his profession was compared with the obligation of the hospital to maintain the highest standard of care. Balancing these two considerations, it was found that no hearing was necessitated before the hospital could act, but the court stated:

We think it clear that the determination to restrict a physician's privileges is one which should be subject to an evidentiary hearing at some point in the administrative process (Citta, supra, at 308).

In this case, we have indicated to the Court that a hearing before Petitioner's designation was refused renewal would have been appropriate because of the charges levied, but a hearing at this time on the charges

would be adequate protection for the reasons cited in Citta, supra.

Petitioner herein adopts the position stated by the Supreme Court in Morgan v. U.S., 304 U.S. 1 (1937), wherein it was stated:

The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in an administrative proceeding of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. (Morgan, supra, at 14-15).

The Morgan Court found that these fundamentals of fair play demand a fair and open hearing to assure both the legal validity of, and public confidence in, the value and soundness of the administrative process. The Court described a hearing held under these circumstances as an "inexorable safeguard" (Morgan, supra, at 14). Petitioner submits that such a safeguard is essential to his case as well.

B. The Administrator may not hide behind words of discretion in Section 1002 of the Act.

It is likely that the Administrator will raise the cry of "discretion" in defense of the actions which have been questioned in this Petition. It is true that Section 1002 of the Act [49 U. S. C. §1482] does allow the Administrator to dismiss a complaint without a hearing when, in the exercise of his discretion, he determines that such a complaint does not state facts which warrant an investigation or action. But, this Section of the Act cannot be said to stand for unbridled discretion; for, if it is found to do so, the case law tells us that the Section must be found unconstitutional. Bratton v. Chandler, 260 U. S. 110, 114-115, (1922). Such a result is undesirable and unnecessary, since this Court may place such limits on the discretion granted to the Administrator as to render the statute acceptable.

The distinguished lawyer, Elihu Root warned us of the dangers of a growing administrative establishment as early as 1916 when he stated:

[T]he powers that are committed to these regulating agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong. If we are to continue a government of limited power these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain. 1

1. Root, "Public Service by the Bar," Address of the President. Report of the 39th Annual Meeting of the American Bar Association, Chicago, Illinois, Aug. 30, 31 and Sept. 1, 1916, p. 355, 368 (1916).

Perhaps recognizing the need for a growing period, reviewing courts for many years upheld the "sensible judgments" of administrative bodies on the theory that they expressed an expertise into which these courts should not intrude. WHDH, Inc. v. FCC, No. 23, 159 (D. C. Cir. November 13, 1970) (Slip Op. at 20). However, administrative bodies have reached, or are reaching, a level of maturity where the courts may feel justified in exercising the level of surveillance called for by Root.

This Court has recently expressed a willingness to question "discretionary" expert judgments of administrative agencies to assure itself that the agency exercised a reasoned discretion. As this Court noted in WHDH, Inc., supra; Slip Op. at 16-17:

Expert discretion is secured, not crippled, by the requirements for substantial evidence, findings and reasoned analysis. Expertise is strengthened in its proper role as the servant of government when it is denied the opportunity to "become a monster which rules with no practical limits on its discretion.
Burlington Truck Lines v. United States, 371 U. S. 156, 167 (1962).

The supervisory function envisioned by this Court calls on the court to intervene "if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." (WHDH, Inc., supra, Slip. Op. at 18). Thus, the court is engaged with the administrative agency in a partnership in

furtherance of both the public interest and the interests of justice.

(WHDH, Inc., supra, Slip. Op. at 19). As noted above, the "doctrine that has evolved with the enormous growth and significance of administrative determination...has insisted on reasoned decision-making"; and "at least so long as the government uses the forms of adjudication...as the most feasible guarantor of neutral and acceptable selection, reasoned decision-making remains a requirement of our law."

(WHDH, Inc., supra, Slip Op. at 20).

This Court has considered a statute quite similar to Section 1002 of the Act [49 U. S. C. §1482] in the case of Citizens Committee v. Federal Communications Commission, No. 23, 515 (D. C. Cir. October 30, 1970). There the Court was concerned with Section 309(e) of the Federal Communications Act of 1934, as amended [47 U. S. C. §309(e)] which provides, in part, that if, in the case of applications for renewal or transfer of license, "a substantial and material question of fact is presented," or the Commission is for any reason unable to make the prescribed findings, "it shall formally designate the application for hearing." With regard to the Commission's decision not to afford the opportunity for a hearing, this Court said:

To justify the omission of a hearing in this case, therefore, it is necessary to demonstrate that there were no 'material and substantial questions of fact' bearing significantly upon the exercise of the Commission's

[5 U. S. C. §701(a)(2) (Supp. V, 1965-69)]. In rejecting this argument, this Court quoted from 4 K, Davis, Administrative Law Treatise 33 (1958) as follows: "[T]he question is not whether agency action is by law committed to agency discretion but to what extent agency action is so committed." (Medical Committee, supra, at 673, emphasis by the Court).

Petitioner herein submits that limits have been placed on the Administrator's discretion by the requirements of due process discussed above. The Administrator may have discretion to dismiss a complaint without a hearing under Section 1002 of the Act [49 U. S. C. §1482]. But his discretion ends when he dismisses the complaint of an individual who the case law tells us is entitled to the protections of due process, namely adequate notice, full hearing, opportunity to know and rebut charges against him, opportunity to present evidence in his own behalf, and opportunity to cross-examine witnesses against him. See Trailways of New England v. CAB, 412 F. 2d 926, 931 (1st Cir. 1969); Goldsmith v. United States Board of Tax Appeals, 270 U. S. 117, 123 (1925). Dismissal of Petitioner's complaint without a hearing was not discretionary; it was arbitrary.

judgment. In this court, counsel for the Commission has asserted principally the proposition that the Commission has a discretion in these matters which is not to be disturbed unless it is palpably abused. This is, of course, a general truth which needs no demonstration. Its bare assertion does not, however, answer the question of whether that discretion in this particular case was required, prior to its exercise, to be informed as accurately as possible by reliable facts relevant to that exercise. It is in this respect that we query the Commission's conformity with the statutory prescription for the provision of hearings.

(Citizens, supra, Slip Op. at 9)

This case is particularly strong for Petitioner herein, because the Court remanded the case to the Commission for an evidentiary hearing, even though the Commission cited a broad range of factual reasons for its denial of a hearing. In the instant case, this Court does not have the comfort of any factual findings by the Administrator. It is submitted that this is all the more reason for a remand and hearing.

Administrative discretion was raised as a defense before this Court by the Securities and Exchange Commission in the recent case of Medical Committee for Human Rights v. S. E. C., U. S. App. D. C. 432 F. 2d 659 (1970). The Commission argued that the action which the court had been petitioned to review fell within the purview of administrative discretion and, therefore, was protected from judicial inquiry or interference by Section 10 of the Administrative Procedure Act

C. The Administrator's Actions in This Case Have Involved Abuse of Discretion and Have Resulted in Denial of Due Process to the Petitioner

There can be no doubt that, at some point in the administrative process whereby a public license or designation is denied or removed, the administrative agency must grant to the individual involved the protections of due process of law. Further, it is submitted that refusal by the administrative agency to grant such protections amounts to an abuse of whatever discretion has been granted to that agency for the purpose of making such decisions. Moreover, these fundamental legal principles have real meaning in an individual case where they are supported by actual circumstances. Therefore, review of the facts of your Petitioner's situation is called for.

Your Petitioner was originally designated as an Aviation Medical Examiner by the FAA in 1961. For nearly nine years, he performed the functions of an Aviation Medical Examiner by conducting physical examinations required by FAA to determine pilots' medical qualifications for certificates that entitle them to fly. Furthermore, he was designated as a Senior Aviation Medical Examiner, and, thus, was entitled to examine and pass on the medical qualifications of command pilots for commercial airlines. During these many years, he developed a large clientele of pilots who came to depend on him not only for FAA physicals, but also for general medical treatment for them and their families. Thus, his aviation and aviation related practice grew to become a significant portion of his overall practice. He also participated

in FAA-sponsored Air Traffic Control and Accident Investigation programs.

As we have noted previously, FAA never questioned his competence to perform these functions, and, in fact, praised him for his work.

In 1968, he became involved with a pilot whose physical condition was such that his status under the physical standards of the Federal Aviation Regulations was ambiguous. This pilot had a physical heart defect that was technically disqualifying, but all of the modern tests of heart function that were performed on him revealed a normally functioning heart. Petitioner performed a physical examination on this man and, because of the technically disqualifying condition, refused to issue him a certificate. However, he developed this pilot's case history into a report and forwarded it to the Regional Flight Surgeon for further action. Therein, he noted that this pilot's normally functioning heart warranted close consideration. When this pilot's application for certificate was finally and formally denied by Petitioner's superiors, the case was appealed to the National Transportation Safety Board for review. Petitioner did testify at a hearing on the matter in October of 1969, at which time he expressed his opinion as a physician and scientist with significant military and civil experience in aviation medicine that, from a medical viewpoint, this pilot could fly an airplane safely. Petitioner testified at a hearing in another case in December of 1969 concerning a pilot whom the FAA finally certified prior to completion of the hearing. Obviously, Petitioner's involvement in these cases was known to the Regional Flight

Surgeon and Federal Air Surgeon. However, he was never advised by them that his activities were considered improper, nor did the Federal Aviation Regulations or FAA publications provide any guidelines in this regard.

Thus, Petitioner had no knowledge, and no way of acquiring knowledge, of the FAA's requirements concerning participation by Aviation Medical Examiners in "contested" cases. Nevertheless, in March of 1970, he was informed by Dr. Harry Faulkner, Regional Flight Surgeon, that his designation would not be renewed in a letter that contained no explanations. To say that this letter came as a surprise to the Petitioner after nearly nine years of service to FAA is an understatement. It certainly led him to seek the agency's reasons behind its decision and an opportunity to explain his reasons for his actions.

Therefore, Petitioner retained counsel for the purpose of exploring avenues for presenting his position to the FAA in the hope of a favorable reconsideration. Counsel wrote numerous letters requesting the reasons behind the decision and the opportunity to discuss the matter with the Federal Air Surgeon. In return, he received a number of vague references to unidentified activities which the FAA apparently considered a conflict of interest. The requests for a meeting with the Federal Air Surgeon were ignored. Indeed, the only meeting that ever took place involved a representative of FAA's Office of General Counsel who was interested primarily in potential litigation. Even though counsel for Petitioner was invited to

write an explanatory letter as a result of this meeting, that letter was really a meaningless exercise. Counsel was asked to explain Petitioner's involvement in situations which were never identified by FAA. Therefore, he could only surmise as to what information was desired. Clearly, the letter was insufficient since the Federal Air Surgeon dismissed summarily Petitioner's request for reconsideration.

Since this series of correspondence with the Federal Air Surgeon and representatives of the Southern Region of FAA produced no results, Petitioner decided to try the only avenue left open to him, an appeal to the Administrator himself via a complaint filed under Section 1002 of the Act [49 U.S.C. §1482], requesting a hearing. Although Petitioner had never had any real opportunity to present his side of this controversy, the Administrator dismissed his complaint on the grounds that the facts warranted no further investigation and, therefore, no hearing.

Thus, Petitioner has lost his designation as an Aviation Medical Examiner on the sole basis of allegations made by representatives of FAA concerning his professional integrity, not his medical qualifications or competence. As a result of that action, his professional reputation has been damaged and he has been economically injured through the loss of patients. The import of the FAA's allegations, so far as we know, is that Petitioner has refused to play the role of "company man" and has had the temerity to raise scientific questions concerning the correctness of medical

decisions made by FAA-employed physicians. Nowhere in the statutes or regulations have we been told that the FAA's Office of Aviation Medicine or the Regional Flight Surgeon's Office are the sole repositories of aviation medical wisdom. The refusal of the Administrator to listen to Petitioner, through the vehicle of a fair and open hearing, represents the depth of arbitrariness considering the gravity of the allegations concerning Petitioner's integrity.

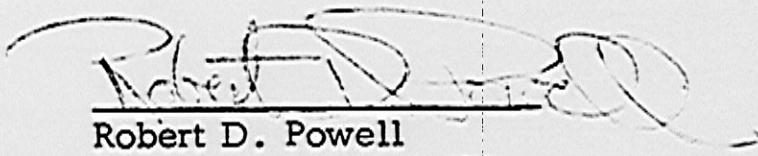
CONCLUSION

Public attention has recently been drawn to the problem of individual frustration caused by a seemingly unresponsive, all-powerful Federal Establishment. Citizens of all ranks and conditions, from the President to the youth of America, have called for a greater awareness of the individual. This Court has played no small part in requiring administrative agencies to articulate their reasons for decisions that seriously affect the citizenry. One means that has been employed is the requirement for fair hearings. Your Petitioner has experienced great frustration during this past year of attempts to have the FAA listen to him, because all his attempts have been ignored. His request is a small one, considering the apparent gravity of the charges against him. He desires this Court to guarantee that FAA will hear and consider his position on the merits of his case.

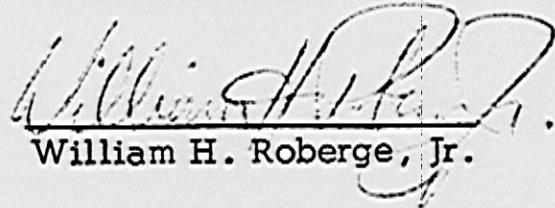
For the reasons stated above, Petitioner respectfully urges the Court to vacate the Order of October 23, 1970, which dismissed his complaint, and to remand the matter to FAA with instructions that that Agency shall grant Petitioner a fair and open hearing wherein he may present

documentary and testimonial evidence in his own behalf and confront and cross-examine the witnesses against him. It is further requested that the Court retain jurisdiction over the record of that hearing for the purpose of further review.

Respectfully submitted,



Robert D. Powell



William H. Roberge, Jr.

Attorneys for Petitioner

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700 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006
202-296-0600

Dated: February 16, 1971

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DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

WASHINGTON, D.C. 20590

Smith, Pepper, Shack & L'Heureux

RECEIVED
OCT 29 1970
RECORDEDOFFICE OF
THE ADMINISTRATOR

28 OCT 1970

Robert D. Powell, Esquire
 Smith, Pepper, Shack and L'Heureux
 1776 K Street, N.W.
 Washington, D.C. 20006

Re: The Matter of the Complaint of Emil P. Taxay, M.D.

Dear Mr. Powell:

This is in reply to the Complaint of 8 July 1970 filed by you concerning action taken by the Federal Aviation Administration declining to redesignate Emil P. Taxay, M.D., as an Aviation Medical Examiner.

Upon receipt of the Complaint, we caused it to be referred for consideration by an Office unrelated to either the Office of Aviation Medicine or the Office of the General Counsel. That Office has furnished to us, and we have reviewed, their independent evaluation and recommendation concerning the action taken by Dr. Peter V. Siegel, M.D., the Federal Air Surgeon, and Dr. Harry Faulkner, M.D., Regional Flight Surgeon, Southern Region, under authority delegated to them. From a review and consideration of both the Complaint and the report, we have concluded that there does not exist any reasonable basis for reversal of the decision made by Dr. Siegel and Dr. Faulkner not to redesignate Dr. Taxay.

As we are of the opinion that the Complaint does not contain facts which would warrant further investigation, we therefore consider this matter dismissed without the necessity for additional action.

Sincerely,

A handwritten signature in black ink, appearing to read "J. H. Shaffer".

J. H. Shaffer
Administrator

UNITED STATES OF AMERICA
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D. C.

In the Matter of the Complaint of

EMIL P. TAXAY, M. D.

Docket No. _____

Against John H. Shaffer, Administrator,
Federal Aviation Administration;
Peter V. Siegel, M. D., Federal Air
Surgeon, Federal Aviation Administration;
and Harry Faulkner, M. D., Regional
Flight Surgeon, Southern Region,
Federal Aviation Administration

TO: John H. Shaffer, Administrator

COMPLAINT

Comes now Emil P. Taxay, M. D. (hereinafter "Plaintiff"), by his
attorneys, and files this Complaint, pursuant to Section 1002(a) of the Federal
Aviation Act of 1958, as amended, against John H. Shaffer, Administrator of
the Federal Aviation Administration; Peter V. Siegel, M. D., Federal Air Surgeon
of the Federal Aviation Administration; and Harry V. Faulkner, M. D., Regional
Flight Surgeon for the Southern Region of the Federal Aviation Administration.

1. Plaintiff is currently practicing medicine in Miami, Florida.

He is a Diplomate of the American Board of Internal Medicine and special-
izes in both internal medicine and cardiology. Plaintiff sees approximately
150 patients a week, about 15 per cent of whom are pilots. He is on the
staff of four hospitals in the Miami area. He has served on the faculty of

the University of Miami School of Medicine, both as an instructor and assistant professor. Plaintiff holds memberships in a number of local, national and international medical associations and has published over twenty articles in medical journals. He served four years active and nine years reserve duty as a flight surgeon with the U. S. Air Force. Plaintiff's academic record is excellent. He entered the University of Cincinnati at age fifteen, graduated at age eighteen, and received a Master's degree in chemistry at age nineteen. He then entered medical school at Cincinnati and graduated in 1954. He was honored by receiving an internship at Walter Reed Army Hospital, a much coveted position. A copy of Plaintiff's curriculum vitae is attached hereto as Attachment A.

2. Plaintiff was originally designated as a Senior Aviation Medical Examiner (AME) by the FAA on August 7, 1961. In this capacity he has examined approximately 100 airmen a year to determine their qualifications for medical certification under Part 67 of the Federal Aviation Regulations. Plaintiff cannot recall any occasion during the time since his designation when he was advised by the FAA that his work was unsatisfactory. In fact, Plaintiff has been praised by FAA officials for his work as an AME (see Attachment B). To his credit, Plaintiff has attended all required refresher courses in aviation medicine and for several years has voluntarily participated in the FAA-sponsored Air Traffic Control Program and the FAA-sponsored Accident Investigation Program.

3. On March 29, 1970, Plaintiff received a letter from Dr. Harry Faulkner, Regional Flight Surgeon for the Southern Region of the Federal Aviation Administration, dated March 25, 1970, notifying Plaintiff that his designation as an AME would not be renewed and that his function as such would terminate as of March 30, 1970 (see Attachment C). Dr. Faulkner stated that he had reviewed Plaintiff's record of activity as an AME and that "it would not be in the best interests of the Federal Aviation Administration to reappoint [him] as an Aviation Medical Examiner." No other reason was given.

4. On March 30, 1970, Plaintiff engaged the undersigned, Robert D. Powell, Esq., to aid him in attempting to regain his designation. On April 6, 1970, Mr. Powell, on behalf of Plaintiff, wrote to Dr. Peter V. Siegel, Federal Air Surgeon for the Federal Aviation Administration, to request reconsideration of Dr. Faulkner's action (see Attachment D). On April 7, 1970, Mr. Powell wrote to Dr. Faulkner requesting a definite statement of the reasons for Dr. Faulkner's refusal to redesignate Plaintiff (see Attachment E). Mr. Powell's letter to Dr. Faulkner was referred to J. N. Coker, Esq., Regional Counsel for the Southern Region of the Federal Aviation Administration, for

reply. In response to the request for a definite statement of reasons, Mr. Coker replied: "It is believed that you and Dr. Taxay are aware of the reasons for such determination." (see Attachment F).

5. On April 13, 1970, Mr. Powell wrote to Mr. Coker to again request specific reasons for Dr. Faulkner's refusal to redesignate as Mr. Coker's first letter was deemed an insufficient explanation (see Attachment G). Mr. Coker responded to this further request by letter dated April 20, 1970 (see Attachment H). His letter was brief, considering the gravity of the action taken, and contained misinterpretations of the situation involved. In the second paragraph of his letter, Mr. Coker implies that Plaintiff has appeared in National Transportation Safety Board proceedings on contested medical certification cases as an expert witness in opposition to the FAA while characterizing himself as a representative of the Administrator. This is simply untrue, as an impartial review of the facts would clearly show. Further, Mr. Coker states that Mr. Powell has used, and is using, Plaintiff as a consultant "in opposing the Administrator" in contested cases. This statement is also a half-truth, the unfavorable implications of which can easily be dispelled by an examination of Plaintiff's dealings with Mr. Powell.

6. Dr. Siegel exhibited this same attitude in his letter to Mr.

Powell dated April 24, 1970 (see Attachment I). There he stated: "I do not need to go into great detail with you since you know that it is difficult for an individual to both serve as a representative of the Administrator and as a representative against the Administrator." Dr. Siegel also wrote to Plaintiff on April 24 and charged him with serving on a regular basis as a paid consultant to attorneys opposing the Administrator (see Attachment J). Clearly, Dr. Siegel has charged Plaintiff with a conflict of interest, an ethical consideration that questions Plaintiff's fitness to serve as an AME. Dr. Siegel's statement that such a charge is no reflection on Plaintiff is untrue; it is clearly a reflection on, and impugnation of, Plaintiff's professional ethics and character.

7. The Federal Aviation Administration has expanded on its position

with regard to Plaintiff in letters directed to United States Senators who had inquired about the situation at Plaintiff's request. On April 9, 1970, James Rogers, Director of the Southern Region for the Federal Aviation Administration, wrote to the Honorable Spessard L. Holland (see Attachment K). Mr. Roger's letter is a classic example of the use of half-truths and innuendo that is damaging to Plaintiff's professional reputation. In paragraph 4, Mr. Rogers berates Plaintiff for aiding Mr. Powell in developing a case against the Administrator in the instance of a pilot whom "the Administrator does not feel is qualified"

for medical certification. This pilot is not identified by Mr. Rogers, but Plaintiff believes he knows to whom Mr. Rogers is referring. Plaintiff's sole activity in this case was performance of a physical examination and a flight test, after which he denied the pilot certification because of the Administrator's expressed position on the case, forwarding the results of the examination to the Regional Flight Surgeon for further action. To date, the Regional Flight Surgeon and the Federal Air Surgeon have not acted on this case. Mr. Rogers cannot be heard to complain of this type of activity which was strictly "by the book." Mr. Rogers goes on in paragraph 4 to state that Plaintiff has disagreed with the Administrator's action in certain cases. This statement is another example of misinterpretation by representatives of the Administrator. Plaintiff has appeared for pilots in two cases before the National Transportation Safety Board. In one, the chief witness for the Administrator agreed with Plaintiff's position; in the other, Plaintiff appeared and offered a medical explanation for loss of consciousness suffered by a pilot who had been denied certification by the Administrator for disturbance of consciousness without satisfactory medical explanation. In neither case, could Plaintiff be charged with disagreeing with the Administrator. Further, in paragraph 5, Mr. Rogers engages in a characterization of Plaintiff's ethics that is

unsupported by fact and that is slanderous in its implications. The import of Mr. Roger's letter is the charge that Plaintiff has engaged in a conflict of interest situation and has actively sought to undercut the authority of the Administrator. This charge is supported, not by fact, but by suggestion, and must fall before an impartial review of Plaintiff's activities as an AME. The Administrator himself responded to an inquiry from the Honorable Edward J. Gurney, United States Senator, in a letter dated June 16, 1970 (see Attachment L). For the most part, his letter is couched in general terms with all the earmarks of a statement of policy. For instance, the Administrator equates AME's with employees of the Administration and states that the policy of the Department of Transportation is to forbid employees and AME's from taking "positions adverse to the Department in legal proceedings between the Department and third parties." (Paragraph 2). An AME is in a position analogous to that of an employee, he states, because an AME receives "a certain amount of training and information and becomes privy to FAA's views on medical facts critical to its decisions." The Administrator concludes that this relationship involves a degree of trust and confidence. (Paragraph 2). He goes on to say that because individual and public interest often collide in the area of airman medical certification, no man can essentially occupy both sides (paragraph 3).

and, according to the Administrator, this is exactly what Plaintiff has done "as an organized course of conduct." (Paragraph 4). This one sentence is the only specific reference to Plaintiff in the Administrator's entire letter. However, it is interesting to note that the Administrator would not object to an AME "occasionally taking an applicant's side in proceedings before FAA when he feels conscientiously impelled to do so in the interest of individual justice." (Paragraph 4). Plaintiff submits that an impartial review of the facts of his case would reveal that he has done no more than what the Administrator considers acceptable.

8. Plaintiff strongly disagrees with the position taken by the Administrator and his authorized representatives in the handling of the matter and believes that all the facts of his involvement in airmen medical cases have not been considered or that an unfair interpretation has been placed upon them. In an effort to present his "side of the story," Plaintiff authorized Mr. Powell to request a meeting with Dr. Siegel or his representative. Although this request was made on two separate occasions (see Attachments D and M), no such meeting ever took place. However, Mr. Powell did attempt to present Plaintiff's position at a meeting requested by Mr. Jennings Roberts, Associate General Counsel of the Operations and Evaluation Branch of the Federal

Aviation Administration and held at Mr. Roberts' offices. Present were Mr. Roberts, Mr. John Marsh, also of the Office of General Counsel, Mr. Powell and Mr. Robert Buenzle, Mr. Powell's associate. It is interesting to note that Mr. Roberts' stated reason for requesting this meeting was to discuss possible legal action which Plaintiff might bring against the Federal Aviation Administration. Its main purpose was not to present Plaintiff's position, nor was the Federal Aviation Administration prepared to discuss in detail its reasons for refusing to renew Plaintiff's designation. Rather, Mr. Roberts indicated that it was the Federal Aviation Administration's wish to put an end to AME's participating in any aviation medical case from a position favoring a pilot, except under subpoena. Mr. Roberts indicated that it was the Administration's aim to deny a pilot the assistance of a physician skilled and recurrently trained in aviation medical matters. This type of expertise was to be retained by the Federal Aviation Administration alone so that the Administration would be able to win more cases at the hearing level. This is similar to the position later taken by the Administrator in his letter to Senator Gurney and discussed, supra. A more reasonable position was taken by Mr. Marsh who thought that what was being complained of was the belief that Plaintiff was acting as an AME on specific cases, passing on them as a

representative of the Administrator, and later appearing at a National Transportation Safety Board hearing on behalf of the pilot as a regular course of conduct. Mr. Powell indicated that this was not an accurate description of Plaintiff's involvement in airmen medical cases and offered to write an explanatory letter. Mr. Marsh agreed that this was a good idea and indicated that, if there was in fact a mistake or misunderstanding, Plaintiff would be redesignated, since good AME's are hard to come by.

9. Mr. Powell followed Mr. Marsh's suggestion by letter dated

May 21, 1970 (see Attachment N). Dr. Siegel replied by letter dated June 10, 1970, in which he indicated that Mr. Powell's letter presented no new information that would lead him to renew Plaintiff's designation as an AME (see Attachment O). Except for this letter to Mr. Marsh, Plaintiff has been given no opportunity to present his position concerning the charges levelled against him by the Administrator and his authorized representatives, even though those charges have direct bearing on his fitness to perform the duties of an AME and on his professional ethics. Furthermore, Plaintiff has been given no opportunity at all to confront directly the individuals who have formulated these charges and to test their credibility by cross-examination.

10. The mere fact that the Administrator and his authorized representatives are granted discretion to renew or refuse to renew an AME's designation [§314(a), Federal Aviation Act of 1958, as amended; §183.15, Federal Aviation Regulations (14 C.F.R. §183.15)], is not determinative in this case. No administrative official is granted discretion to act in an arbitrary or capricious manner and the conclusions reached by the Administrator, Dr. Siegel and Dr. Faulkner in this case are arbitrary. Prior to issuing his refusal to redesignate the Plaintiff, Dr. Faulkner failed to advise Plaintiff that his activities were considered improper, initially failed to apprise Plaintiff of the nature of the charges placed against him, and failed to learn Plaintiff's position on those charges. It is submitted that these failures on Dr. Faulkner's part rendered it impossible for him to make a fair and impartial decision on the question of Plaintiff's redesignation. When reasons for Dr. Faulkner's action were finally obtained from the Administrator and his representatives, they were presented in vague and general terms and included misinterpretations of the facts of this case. Although he has been charged with conflict of interest, to this day Plaintiff does not know exactly on which cases he is supposedly in conflict with the Federal Aviation Administration. Therefore, the rebuttal

prepared by Mr. Powell at Mr. Marsh's request must of necessity be inadequate, for he was, and is, unsure of what had to be rebutted. Thus, it was impossible for Dr. Siegel to render fair and impartial reconsideration of Dr. Faulkner's action as he was exposed to only one side of the argument. Plaintiff has not been fully informed as to which of his activities have been considered grounds for the refusal to renew his designation as an AME, nor has he been allowed to adequately present his views concerning those activities. Refusal to renew Plaintiff's designation under these circumstances must perforce be arbitrary and outside the scope of the discretion granted by the Act and the Federal Aviation Regulations.

11. Based on the facts as stated herein, Plaintiff registers the following complaints:

(a) That the Administrator and Dr. Siegel, the Federal Air Surgeon, acting as the designated representative of the Administrator, have established a policy prohibiting designated Aviation Medical Examiners from testifying on behalf of airmen at National Transportation Safety Board hearings; and, that the Administrator and the Federal Air Surgeon have acted in contravention of Section 601(a)(6) of the Federal Aviation Act of 1958, as amended, and Section 552 of the Administrative Procedure Act [5 U.S.C.A. §552], by establishing a policy and failing to follow the prescribed procedures for notification of the Plaintiff and other Aviation Medical Examiners of that policy by publication prior to enforcement.

- (b) That Dr. Faulkner, Regional Flight Surgeon, under authority delegated by the Administrator, acted in contravention of Section 314(a) of the Federal Aviation Act of 1958, as amended, and Section 183.15 of the Federal Aviation Regulations [14 C.F.R. §183.15] by arbitrarily refusing to renew Plaintiff's designation as an Aviation Medical Examiner without informing Plaintiff of the charges against him or affording Plaintiff the opportunity to rebut those charges.
- (c) That Dr. Siegel, Federal Air Surgeon, under authority delegated by the Administrator, acted in contravention of Section 314(a) of the Federal Aviation Act of 1958, as amended, and Section 183.15 of the Federal Aviation Regulations [14 C.F.R. §183.15] by arbitrarily refusing to renew Plaintiff's designation as an Aviation Medical Examiner, on reconsideration of Dr. Faulkner's action, without affording Plaintiff the opportunity to rebut the charges levelled against him.
- (d) That the Administrator, Dr. Siegel, and Dr. Faulkner have acted in contravention of Section 314(a) of the Federal Aviation Act of 1958, as amended, and Section 183.15 of the Federal Aviation Regulations [14 C.F.R. §183.15] by refusing to renew Plaintiff's designation as an Aviation Medical Examiner as a means of punishing Plaintiff for activities which Plaintiff was never advised were considered improper by the Administrator or his designated representatives.
- (e) That the interpretation of the role of the Aviation Medical Examiner exhibited by Dr. Siegel and Dr. Faulkner in their conduct in

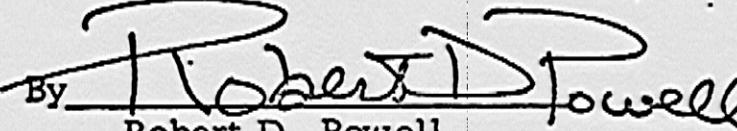
this matter and expressed by Mr. Jennings Roberts and the Administrator in regard to expert testimony of Aviation Medical Examiners in hearings before the National Transportation Safety Board has no basis in the statutory authority of Section 314(a) of the Act or in Subpart B of Part 183 of the Federal Aviation Regulations and constitutes an infringement of Plaintiff's constitutionally guaranteed right of free speech by denying renewal of his designation and, thus, punishing him for exercising that right.

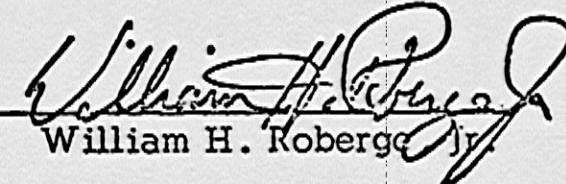
12. The arbitrary refusal on the part of Dr. Siegel and Dr. Faulkner to renew Plaintiff's designation as an Aviation Medical Examiner has resulted in damage to Plaintiff's financial position and professional reputation. Because he can no longer examine airmen as an AME, Plaintiff has lost a portion of his practice that amounted to approximately \$600.00 per year. Further, Plaintiff has been denied the practice of aviation medicine to which he dedicated a great deal of time, effort, and interest over the past eight and one-half years. The scientific interest in aviation medicine which Plaintiff gratified by participation in AME and AME-related programs far outweighed the remuneration he received and constitutes more of a loss to Plaintiff personally than does the loss of income. What is most important, however, is that by the terms of the correspondence attached hereto, the Administrator and his authorized representatives have clearly stated that they question Plaintiff's professional ethics and conduct. Such serious charges should never have been arbitrarily made, and opportunity must be afforded to rebut them.

WHEREFORE, UPON THE PREMISES CONSIDERED, Plaintiff respectfully requests that the Administrator exercise the power granted to him by Section 1002(a) of the Federal Aviation Act of 1958, as amended, by compelling Dr. Siegel to renew Plaintiff's designation as an Aviation Medical Examiner, or, in the alternative, that the Administrator conduct an investigation of the circumstances surrounding Dr. Siegel's and Dr. Faulkner's refusals to renew Plaintiff's designation as an Aviation Medical Examiner by means of an evidentiary hearing at which Plaintiff would have a full opportunity to learn the true nature of the charges against him, to cross-examine witnesses presented by the Federal Aviation Administration, and to present his position concerning this matter through documentary and testimonial evidence.

Respectfully submitted,

EMIL P. TAXAY, M. D.

By 
Robert D. Powell

By 
William H. Roberge, Jr.

His Attorneys

Smith, Pepper, Shack
& L'Heureux
1776 K Street, N. W.
Washington, D. C.

July 8, 1970

1
2
3
4 C U R R I C U L U M V I T A E

5 "EMIL P. TAXAY, M.D.
6 8400 S.W. 90th Street
7 Miami, 56, Florida

8 I. Biography:

9 A. Personal

10 "Born 3 January 1930, Terre Haute, Indiana.
11 Father: J. M. Taxay, Minister. Mother:
12 Mildred M., Editor. Wife: Shirley L., Nurse.

13 B. Education

14 "Public school, Terre Haute, Indiana and Akron,
15 Ohio. Graduated from John R. Buchtel High
16 School, Akron, Ohio 1946.

17 "University of Cincinnati, Cincinnati, Ohio
18 1949, B.S. (Chemistry). Also Hebrew Union
19 College, (Semantics and Philosophy), and
20 St. Xavier's University (Comparative Religion
21 and Philosophy).
22 No degrees from latter institutions.

23 "M.S. in the Graduate School of Chemistry
24 at the University of Cincinnati, Cincinnati,
25 Ohio, 1949-1950. (Synthetic elaboration of
Yohimbine.)

26 "University of Cincinnati School of Medicine,
27 M.D., 1954.

28 "Rotating Internship, Walter Reed Army
29 Hospital, 1954-1955. Postgraduate School of
30 Medicine, University of Oxford (Oxford,
31 England) 1955-1957.
32 First year Residency (Medicine), Boston City
33 Hospital, Boston, Massachusetts, 1957-1958.
34 Second year Residency, Jackson Memorial

1 Hospital and the University of Miami School
2 of Medicine, 1958-1959.
3 Chief Resident in Medicine, 1960, Jackson
4 Memorial Hospital, Miami, Florida.

5 "Faculty of the University of Miami School of
6 Medicine, 1 July 1960, as Instructor in
7 Medicine.

8 Currently: Assistant Professor of Medicine,
9 Assistant Professor of Preventive Medicine
10 and Public Health, Director, Postgraduate
11 Education for Latin American Physicians.
12 Attending Physician, Jackson Memorial Hospital.

13 "C. Military Service

14 "Overseas as Captain in the Strategic Air
15 Command, 1955-1957. Functioned as 8th Air
16 Force Training Officer, Deputy Hospital
17 Commander, Flight Surgeon and Internist.

18 "Captain, USAF Reserve. Flight Surgeon,
19 435th TAC Hospital, Homestead Air Force Base,
20 Florida.

21 "Recalled to Active Duty, 1 October 1961.
22 Served as Detachment Commander, 435th TAC
23 Hospital, Donaldson Air Force Base, South
24 Carolina. Also Medical Training Officer,
25 1710th USAF Hospital, Greenville, South
Carolina. Separated 27 August 1962.
Service time - 4 years Active Duty, 9 years
Reserve Duty - Total 13 years.

26 "III. Professional

27 "A. Memberships

28 1. Fellow, Royal Society of Medicine
2. American Federation for Clinical Research
3. American Association of Military Surgeons
4. Associate, American College of Physicians
5. New York Academy of Science
6. Dade County Medical Association
7. Florida Medical Association
8. American Medical Association
9. Medical Aviation Association
10. International Aviation Association
11. American Public Health Association
12. American Rehabilitation Association
13. Fellow, American College of Physicians

1 "B Consultative Appointments and Diplomas

- 2 1. Consultant in Internal Medicine to the
3 West German Government
- 4 2. Consultant in Internal Medicine,
5 Endocrinology and Renal Diseases to the
6 Veterans Administration Hospital, Coral
7 Gables, Florida
- 8 3. Consultant in Internal Medicine to the
9 United States Public Health Service,
10 Miami, Florida.
- 11 4. Instructor, Federal Aviation Agency
- 12 5. Staff Physician: Baptist Hospital,
13 South Miami Hospital, St. Francis
14 Hospital, Cedars of Lebanon Hospital -
15 Miami, Florida
- 16 6. Diplomate, American Board of Internal
17 Medicine
- 18 7. Diplomate, Office of Civil Defense
19 Mobilization, Mass Casualty Courses
20 (Washington, D.C., 1955; New York 1960;
21 Miami 1962)
- 22 8. Consultant in Biochemistry to Muscular
23 Dystrophy Association - Miami Chapter
- 24 9. Consultant in Education, Dominican
25 Republic
1. Consultant in Internal Medicine to
2. Florida State Department of Education
3. Test Consultant, National Board of
4. Medical Examiners
5. Consultant to American Medical
6. Association on Current Medical Terminology
7. Formerly, Director, Adverse Drug Program
8. (Local) of the Food and Drug Administra-
9. tion

10 "C Current Research

- 11 1. Longitudinal Study of Latin American
12 Physicians in the United States
- 13 2. Amino Acid Clearance in Muscular Dystrophy
- 14 3. Clinical Evaluation of ANR-000
- 15 4. Translation of Current Medical Terminology

16 "D Awards

- 17 1. Alfred Stengel Traveling Scholarship,
18 American College of Physicians, April 1961

1 "E Travel

2 "1950 Eastern Europe and Middle East
3 1955-57 Scandinavia and Western Europe
4 1959 Visiting Faculty, University of
5 London
6 School of Medicine, Kingston,
7 Jamaica
8 1960 Director, Andros Island Medical
9 Project, Andros, Bahamas
10 1963 Lecture Tour South America

11 "III. Bibliography

12 "A Publications

13 1. Hemoglobin Synthesis in Porphyria, New
14 England Jour. of Med., Feb. 1955 (with
15 F. Iber)
16 2. An American in Britain, Lancet, Feb. 1957
17 3. Tetanus and Porphyria, West Indies Med.
18 Jour., April 1959
19 4. Malabsorption Syndrome in Diabetes
20 Mellitus, Diabetes, Aug. 1959 (with S.
21 Roath and S. Mitchell)
22 5. Pulmonary Alveolar Microlithiasis, Am.
23 Jour. Clin. Path., Aug. 1959 (with R.
24 Montgomery)
25 6. Diseases of Protein Malnutrition,
Gastroenterology, Aug. 1959
7. Uric Acid Metabolism and Porphyria.
Lancet, Feb. 1961
8. Editorial on Latin American Physicians.
Jour. of the Fla. Med. Assoc., April 1961.
9. Editorial on Refugee Cuban Dentist.
Oral Hygiene, September 1961
10. Studies with Transcortin: The Effects
of Salicylate on the Binding of
Cortisol, Clinical Research, Spring 1962
(with R. Pike)
11. Bilingual Postgraduate Medical Education.
Resident Physician, July 1962
12. Clinical Evaluation of FADT₄, Am. Jour.
Med. Sci., August 1962
13. Accidental Hypothermia, Southern Med.
Jour., Feb. 1963
14. Regional Computer Center, Editorial,
Amer. Jour. of Med., March 1963

15. A Bilingual Audio Visual Aid, Jour. of Med. Edu., March 1963 (with R. Jones and W. Atkinson)
16. The Public Health Laboratory of the Future, Letter to the Editor, Jour. of the Amer. Public Health Assoc., April 1963.
17. Bilingual Dental Education: Report on the Miami Program, Jour. Dental Educ., June 1963
18. Miami Program for Refugee Physicians, Jour. Amer. Med. Assoc., August 1963
19. Bilingual Postgraduate Medical Education: Part I, Jour. of Med. Educ., Nov. 1963 (with R. Jones)
20. Bilingual Postgraduate Medical Education: Part II, Jour. of Med. Educ., Jan. 1964 (with R. Jones)
21. A System of Classification of Examination Questions in Medicine, Privately printed, Feb. 1964
22. Max Gottlieb and You: An Essay on Philosophy and Medicine, accepted for publication by the Bulletin of the Amer. Medical Writers' Association
23. Postgraduate Course in Basic Sciences. A textbook, 1965

15 "D Manuscripts Submitted and in Preparation

- 16 1. Health Care and the Cold War
- 17 2. Computer Programmed Curve Fitting in Drug Screening Experiments
- 18 3. Amino Acid Excretion in Muscular Dystrophy

19 "C Unpublished Clinical Research Data

- 20 1. Renal Salt Handling Before and after Porta-Caval Shunt
- 21 2. Protein Anabolism in Severe Regional Enteritis
- 22 3. Effect of Phosphate Loading in Severe Thyrotoxicosis
- 23 4. Prophylthiouracil in the Pre-Operative Preparation of Patients with Pheochromocytoma
- 24 5. Effect in Scurvy on the Excretion of Phenyllactic Acid and 5-HIAA
- 25 6. The Diagnosis of Pernicious Anemia by Vaseline Smears

7. Free Water Clearance in Patients with Sickle-Cell Trait
8. Therapeutic Trials with Glycine and Benzoic Acid in Patients with Porphyria
9. Red Cell Zinc Levels in Patients with Cirrhotic Cyanosis
10. The Usefulness of Aldoximes in Organophosphate Poisoning
11. Incidence of Fatty Liver in Patients with Diabetes Mellitus
12. The Diagnosis of Macroglobulinemia from Serum Electrophoresis
13. Fibrinolytic Therapy of Veno-Occlusive Hepatic Disease
14. Reserpine and Guanethidine in the Treatment of Thyrotoxicosis
15. Phosphate Metabolism in Thyrotoxicosis
16. A case of Hypertrophia Musculorum Dorsi

"D Intra-mural Developmental Publications

1. The Study of a Semi-Closed Population Unit.
A Joint Study by the University of Miami and the Government of the Bahamas
2. Prospectus for a Department of General Medical Education
3. First Inter-American Congress on Medical Education
4. Meeting the Educational and Staffing Needs of American Hospitals
5. Use of the Non-University Hospital for Teaching Purposes
6. Prospectus for a Hemispheric Audio-Visual Aid Center
7. A Postgraduate Bilingual Course in Dentistry Offered without a Dental School
8. Outline for the Creation of a Bilingual Program in Pharmacology
9. Plans for the Creation of a University of Havana School of Medicine in exile
10. Great Ideas in Biology and Medicine
A Needed New Course for Medical Students
11. A revised Curriculum for the Department of Preventive Medicine and Public Health
12. Needed Reforms at the School of Medicine (Memoranda No. 1 through 22)
13. Plans for a Cuban Affairs Research Program

- 1 24. The Andros Medical Service Unit
- 2 25. The Jamaica Rotational Teaching Program
- 3 26. Report on Cuban Refugees to the American Medical Association Special Committee
- 4 27. A Postgraduate Program for American Physicians
- 5 28. Plans for a Cuban Clinical Center
- 6 29. Outline for the Creation of a Bilingual Law Program
- 7 30. Outline for a Course in Aerospace Medicine
- 8 31. Guide for the Creation of a Young Cuban Medical Journal
- 9 32. Cerebration and Examination: An Analysis of National Board Questions
- 10 33. Status of Cuban Physicians in the United States Today
- 11 34. Plans for the Creation of a Postgraduate School for Latin American Physicians (No. I)
- 12 35. Plans for the Creation of a Postgraduate School for Latin American Physicians (No. II)
- 13 36. Introduction to the Program for Latin American Physicians
- 14 37. Progress Reports on the Latin American Program (No. 1 through 7)

15 "E Essays Privately Distributed

- 16 1. Max Gottlieb and You: An Essay on Philosophy and Medicine
- 17 2. Communication in Medicine, A Statement of the Problem.
- 18 3. A Portrait of the Physician as a Scientist
- 19 4. Cerebration and Examination."

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

SOUTHERN REGION
P.O. BOX 20636
ATLANTA, GEORGIA 30320

1119
ATTACHMENT C



25 March 1970

Emil P. Taxay, M.D.
The Red-Sunset Building
6915 Red Road
Coral Gables, Florida 33134

Dear Doctor Taxay:

In keeping with the agency's policy of annual evaluation of the Examiner Program, we have reviewed your record of activity as a designated representative of this agency. The decision has been reached that it would not be in the best interest of the Federal Aviation Administration to re-appoint you as an Aviation Medical Examiner. Accordingly, your appointment which expires this month will not be renewed.

After 30 March 1970, please return to this office your Aviation Medical Examiner identification card, AME Guide, report forms, and any other Federal Aviation Administration material you may have. We will be unable to accept any airman medical examinations performed by you after that date.

We wish to thank you for your past performance that has served the needs of the agency.

Sincerely,

Harry W. Faulkner
H. W. FAULKNER, M.D.
Regional Flight Surgeon
Aviation Medical Division

1111

SMITH, PEPPER, SHACK & L'HEUREUX

ATTORNEYS AT LAW

700 MONTGOMERY BUILDING
1776 K STREET, NORTHWEST
WASHINGTON, D.C. 20006

TELEPHONE
(202) 296-0600

E. STRATFORD SMITH
VINCENT A. PEPPER
THOMAS G. SHACK, JR.
ROBERT F. CORAZZINI
ROBERT D. L'HEUREUX (1941-1969)
ARTHUR V. WEINBERG
RICHARD S. DECKER
ROBERT D. POWELL
ROBERT J. BULNZE
PHILIP R. HOCHBERG
WILLIAM H. RODERICK, JR.

ATTACHMENT D

April 6, 1970

Peter V. Siegel, M.D.
Federal Air Surgeon
Federal Aviation Administration
800 Independence Avenue
Washington, D. C.

Dear Dr. Siegel:

I have been engaged by Emil P. Taxay, M.D., a specialist in Internal Medicine, practicing at 6915 Red Road, Coral Gables, Florida, to look into the action taken by H. W. Faulkner, M.D., Regional Flight Surgeon, Southern Region, regarding Dr. Taxay's standing as a designated aviation medical examiner.

By letter dated March 25, 1970, Dr. Faulkner advised Dr. Taxay that "it would not be in the best interest of the Federal Aviation Administration to reappoint" Dr. Taxay as AME. There are no reasons stated for the decision.

Dr. Taxay has been a designee of the Administrator since August 7, 1961, and at no time within his recollection was there an indication that his work was unacceptable. In fact, Dr. Faulkner's letter of March 25th alludes to Dr. Taxay's "past performance that has served the needs of the agency."

While I am aware that a designee serves for a period of one year and renewal is at the discretion of the Administrator, I would like to appeal to your sense of fairness, and ask that you look into the failure to redesignate Dr. Taxay. I note that you did not sign the

Peter V. Siegel, M.D.

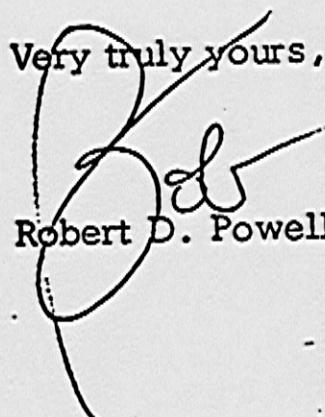
Page Two

April 6, 1970

March 25th letter, which leads me to believe that it still may be possible to seek your counsel on this subject. If I may, I would ask that a meeting be arranged to explore the reasons for the expiration without redesignation in this instance. I am concurrently writing to Dr. Faulkner about this, and will enclose a copy of this letter to keep him advised.

Thank you for your attention.

Very truly yours,



Robert D. Powell

cc:

The Honorable Edward J. Gurney
The Honorable Fletcher Thompson
The Honorable Dante B. Fascell
The Honorable Herman Talmadge
The Honorable Spessard L. Holland
The Honorable Richard L. Ottinger
Dr. Faulkner
Mr. Gary Green
Dr. Taxay
Mr. Max Karant
Capt. K. D. Wright

RDP/pat

111111
SMITH, PEPPER, SHACK & L'HEUREUX

ATTACHMENT E

THATFORD SMITH
BERT A. PEPPER
THOMAS G. SHACK, JR.
BERT F. CORAZZINI
BERT D. L'HEUREUX (1941-1969)
THOMAS V. WEINBERG
BERT S. BECKER
BERT D. POWELL
BERT J. BUENZLE
LIP R. MOCHBERG
SAM M. ROBERGE, JR.

ATTORNEYS AT LAW
700 MONTGOMERY BUILDING
1776 K STREET, NORTHWEST
WASHINGTON, D.C. 20006

TELEPHONE
(202) 296-0600

April 7, 1970

H. W. Faulkner, M.D.
Regional Flight Surgeon
P. O. Box 20636
Atlanta, Georgia 30320

Dear Dr. Faulkner:

I have been engaged by Emil P. Taxay, M.D., to look into the decision of your office not to redesignate Dr. Taxay for another year as an Aviation Medical Examiner. Enclosed is a copy of a letter I have directed to Dr. Siegel.

If possible, I wonder if you could definitively state your reasons for the failure to redesignate Dr. Taxay. As you know, he has been serving as an AME since August, 1961, and has been doing an acceptable job. The sudden removal of his designation is not explicable in this light, and we would appreciate some further word on the subject.

Very truly yours,

Robert D. Powell

Enclosure

cc:

The Honorable Fletcher Thompson
The Honorable Dante B. Fascell
The Honorable Edward J. Gurney
The Honorable Spessard L. Holland
The Honorable Richard L. Ottinger
The Honorable Herman Talmadge
Mr. Max Marant
Emil P. Taxay, M.D.
Peter V. Siegel, M.D.
Mr. Gary Green

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

100-1119
ATTACHMENT F

SOUTHERN REGION
P. O. BOX 20636
ATLANTA, GEORGIA 30320



10 APR 1970

Robert D. Powell, Esquire
Smith, Pepper, Shack & L'Heureux
700 Montgomery Building
1776 K Street, Northwest
Washington, D. C. 20006

Dear Mr. Powell:

Dr. Faulkner has referred to me for reply your letter of 7 April 1970, concerning Emil P. Taxay, M. D.

In your letter of 6 April 1970, to Dr. Siegel, you indicate your awareness that designation of private persons to act as representatives of the Administrator, under the law and regulations, is purely a discretionary matter.

Pursuant to authority delegated to him, Dr. Faulkner has determined that Dr. Taxay should not be authorized to act as a representative of the Administrator. It is believed that you and Dr. Taxay are aware of the reasons for such determination.

Are we to assume that your letters of 6 April 1970, to Dr. Siegel, and 7 April 1970, to Dr. Faulkner, indicate an intention to challenge legally or otherwise the determination made by Dr. Faulkner?

Very truly yours,

J. N. COKER
Regional Counsel

Smith, Pepper, Shack & L'Heureux
RECEIVED
APR 17 1970
RESOLVED

(615)
ATTACHMENT G

April 13, 1970

Mr. J. N. Coker, Esq.
Regional Counsel
Southern Region, Federal
Aviation Administration
P. O. Box 20036
Atlanta, Georgia 30320

Dear Mr. Coker:

I have received your letter of April 10, 1970, and again request that you provide, either directly, or through Dr. Faulkner, a specific description of the reason for the refusal of Dr. Faulkner to renew the designation of Dr. Taxay as an Aviation Medical Examiner.

It is quite clear to Dr. Taxay that there is a great reluctance on the part of your office to spell out the reasons, as no valid reasons exist. If this is not the case, perhaps you would be so kind as to enlighten the record with factual support for the refusal to renew Dr. Taxay's designation. It cannot be satisfactory for you to state "you know why". Perhaps Dr. Taxay does "know why", but it is still the obligation of Dr. Faulkner's office, in reaching an administrative determination, to specify the reasons for the action. We as lawyers must surely know this.

With regard to what action is taken on behalf of Dr. Taxay in this matter, I might say that action has already been taken, the effects of which will dawn with increasing consistency on Dr. Faulkner.

Mr. J. N. Coker, Esq.
Page Two
April 13, 1970

With regard to legal action, we anticipate that unless valid reasons are given for the withdrawal of Dr. Taxay's designation, or unless he is expeditiously redesignated, some form of legal action is being contemplated.

I look forward to your early reply.

Very truly yours,

Robert D. Powell

cc: Senator Talmadge
Senator Holland
Senator Guerney
Congressman Fascell
Congressman Thompson
Congressman Ottlinger
Dr. Emil Taxay
Mr. Gary Green
Mr. Richard Stone
Dr. Richard Masters
Mr. K. D. Wright
Mr. James Brown
Mr. Frank Martineau
Mr. Lee Hines
Mr. Ed Smith
Mr. Ed Bonner

-30A-

RDP/pat

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ATTACHMENT H

SOUTHERN REGION
P.O. BOX 20636
ATLANTA, GEORGIA 30320



20 APR 1970

Robert D. Powell, Esquire
Smith, Pepper, Shack & L'Heureux
700 Montgomery Building
1776 K Street, Northwest
Washington, D. C. 20006

Dear Mr. Powell:

Reference is made to your letter of 13 April 1970, concerning Dr. Taxay.

As you are aware, Dr. Taxay, while serving as a designated representative of the Administrator and identifying himself accordingly, has appeared as an expert medical witness in opposition to the position of the Administrator in proceedings before the National Transportation Safety Board.

You have advised Dr. Faulkner that you are using Dr. Taxay as a consultant in opposing the Administrator in contested medical certification cases and there is no doubt about this activity.

Certainly there is no question as to Dr. Taxay's right to serve as consultant to whomever he pleases or to testify for whomever he chooses. However, it is not sensible or appropriate to continue his designation as a representative of the Administrator under the existing circumstances.

The circumstances described above are considered to fully support and justify the determination made by Dr. Faulkner that Dr. Taxay's designation should not be renewed.

Very truly yours,

J. N. Coker
J. N. COKER
Regional Counsel

Smith, Pepper, Shack & L'Heureux
RECEIVED
APR 24 1970
FEDERAL AVIATION
ADMINISTRATION

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

ATTACHMENT I

WASHINGTON, D.C. 20590



24 APR 1970

Robert D. Powell, Esq.
Smith, Pepper, Shack & L'Heureux
Attorneys at Law
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr Powell:

In reference to your letter of 6 April 1970 concerning Dr. Taxay of Coral Gables, Florida, you will recall that under Federal Aviation Regulations 183.15 the Administrator may terminate the designation of an aviation medical examiner for any one of several reasons.

I do not need to go into great detail with you since you know that it is difficult for an individual to both serve as a representative of the Administrator and as a representative against the Administrator. We welcome Dr. Taxay's future expert medical opinion in the interest of fairness and justice but must reaffirm that this cannot be as a designated aviation medical examiner.

Sincerely,

A handwritten signature in cursive ink that appears to read "P.V. Siegel, M.D."

P. V. SIEGEL, M.D.
Federal Air Surgeon, AM-1

Smith, Pepper, Shack & L'Heureux
RECORDED
APR 27 1970
RECORDED

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

1119 AM 4/19/70
ATTACHMENT J

WASHINGTON, D.C. 20590



9 APR 1970

Paul P. Toney, M.D.
The Red-Sunact Building
6915 Red Road
Coral Cables, Florida 33143

Dear Dr. Toney:

This is in response to your letter of 1 April 1970 concerning your designation as an aviation medical examiner. As you know, the designation of aviation medical examiners is discretionary with the Administrator. As an aviation medical examiner you have served as a representative of the Administrator. However, over the past several months you have also testified in behalf of pilots against the Administrator. You have served so regularly as a paid consultant to attorneys opposing the Administrator in particular cases, that, without any reflection on you, it is preferable from this agency's standpoint not to continue you at the same time in the position of an aviation medical examiner, in which you represent the Administrator and assist in carrying out some of the Administrator's authority and responsibility.

We do not challenge your qualifications and we welcome you to continue to provide expert medical opinion in the interest of fairness and justice. We do not feel it would be in the best interests of the Federal Aviation Administration to have you continue as a designated representative of the Administrator.

Sincerely,

W. F. Siegel

W. F. SIEGEL, M.D.
Federal Air Surgeon, M-1

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

ATTACHMENT K

SOUTHERN REGION
P. O. BOX 20636
ATLANTA, GEORGIA 30320



SENATOR S. L. HOLLAND

RECORDED
APR 14 1970
RECEIVED

WASHINGTON D. C.

9 APR 1970

Honorable Spessard L. Holland
United States Senate
Washington, D.C. 20510

Dear Senator Holland:

Thank you for the opportunity of presenting the Administration's position in this question.

As you may know, appointments as an aviation medical examiner are made for a term of one year. Under the Federal Aviation Act of 1958 and the Federal Aviation Regulations such appointments and renewal of appointments are made at the discretion of the Administrator.

While serving as a designated representative of the Administrator and identifying himself as such, Doctor Taxay has appeared as an expert medical witness against the Administrator in hearings before the National Transportation Safety Board. The appearances against the Administrator have been cases in which the Administrator has felt there was valid medical evidence that an airman did not meet the medical standards set forth in Part 67 of the Federal Aviation Regulations.

Mr. Robert Powell is an attorney who devotes a major portion of his practice to representing members of the Air Line Pilots Association in such hearings before the National Transportation Safety Board.

Mr. Powell personally advised our Regional Flight Surgeon that he is using Doctor Taxay as a consultant. This is borne out in fact.

At this time Doctor Taxay is quite actively involved in helping Mr. Powell develop his case against the Administrator in the instance of an ALPA pilot whom Doctor Taxay knows the Administrator does not feel is qualified under the regulations for medical certification. There are other instances in which Doctor Taxay has written an individual airman taking the Administration to task for its action in denying the individual medical certification.

Characteristically, in none of these instances has Doctor Taxay bothered to determine from the Administration's medical personnel what facts formed the basis of the Administrator's actions.

2

Certainly, we do not question Doctor Taxay's right to serve as consultant to whomever he pleases or to testify for whomever he chooses. On the other hand, it is not sensible to continue his designation as a representative of the Administrator under the existing circumstances. We consider his actions to represent a form of conflict of interest and to compromise his effectiveness as a designated representative of the Administrator.

Doctor Taxay's appointment as an Aviation Medical Examiner expired in March 1970. Because of such actions outlined above, it was determined not to be in the best interest of the Administration to renew his appointment.

Please let me know if we can be of any additional assistance to you in this matter.

Sincerely,

James G. Rogers
JAMES G. ROGERS
Director

-35A-

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

ATTACHMENT L

WASHINGTON, D.C. 20590



16 JUN 1970

OFFICE OF
THE ADMINISTRATOR

Honorable Edward J. Gurney
United States Senate
Committee on Government Operations
Washington, D.C. 20510

Dear Senator Gurney:

This is in reply to your letter of 27 May 1970 concerning Dr. Emil P. Taxay of Coral Gables, Florida. In your letter you set forth a summary of Dr. Taxay's involvement in 20 pilot certification cases handled by a law firm. You consider that Dr. Taxay should be commended for his participation in these cases and not "arbitrarily fired;" and you invite our comments.

Like other government agencies, the Department of Transportation does not permit its employees to take positions adverse to the Department in legal proceedings between the Department and third parties. (Employees may always give factual testimony.) An aviation medical examiner is not an employee, but since he holds a delegation to perform a governmental function on behalf of the Federal Aviation Administration, he is, in this respect, in a position analogous to an employee's. He received a certain amount of training and information and becomes privy to FAA's views on medical facts critical to its decisions. The relationship involves a degree of trust and confidence.

It may well be that sometimes the interest of justice is served by an aviation medical examiner testifying as an expert against the FAA position, but an applicant's interest in justice in his individual case must be balanced against the general interest in justice of the body politic which FAA must represent. It seems to us that in the area of medical certification of airmen as in other areas where individual and public interest often collide, no man can essentially occupy both sides. Furthermore, if aviation medical examiners were generally available as expert witnesses against FAA, litigants would prefer them to experts not connected with the government because of their prestige, which would neither be in the public interest nor in that of other qualified members of the legal profession.

We attempt to attract the services of highly qualified men as aviation medical examiners and therefore have attempted to impose as few restrictions on them as possible. We do not object to an examiner occasionally taking an applicant's side in proceedings before FAA when he feels conscientiously impelled to do so in the interest of individual justice. But it is another thing if the examiner makes it an organized course of conduct, and this is the present case. For this reason we have not renewed the delegation to Dr. Taxay when it expired by its own terms.

We submit that this explanation supports FAA's action. We hope that we have made our position clear and that we have shown a rational basis for our action which was taken in the best interest of aviation safety.

Sincerely,



J. H. Shaffer
Administrator

1119

ATTACHMENT M

May 1, 1970

Peter V. Siegel, M.D.
Federal Air Surgeon
Federal Aviation Administration
800 Independence Avenue
Washington, D.C.

Dear Dr. Siegel:

Thank you for your letter of April 24, 1970 regarding Dr. Emil P. Taxay. There are some important elements of this matter I believe you should be aware of, and I would like to discuss them with you personally in an effort to aid both Dr. Taxay and your office. I am anxious to meet with you on this subject in advance of filing an action in District Court, as there is a chance that our discussion might obviate the necessity for such procedure.

If you can find the time to meet with me during the week of May 3, please have your secretary call and specify a time, or a short note will do.

Thank you for your very kind attention.

Very truly yours,

Robert D. Powell

cc: See Attached List

ATTACHMENT N

May 21, 1970

John E. Marsh, Esq.
Chief, Special Projects and
Appellate Branch GC-31
Office of the General Counsel
Federal Aviation Administration
800 Independence Avenue
Washington, D. C.

Dear John:

If you will recall, at our meeting in Mr. Roberts' office on May 8, 1970, you offered me the opportunity of setting forth in writing Dr. Taxay's position in the matter of the decision of Dr. Faulkner not to redesignate Dr. Taxay as an Aviation Medical Examiner. There may be a material misunderstanding on this subject so I thank you for this opportunity to square the record.

As I expressed during our meeting, Dr. Taxay is a competent, honorable, professional and highly ethical physician. He has been an Aviation Medical Examiner for nine years, and his competence and professional judgment have never been questioned. During this period of time he has developed medical files that have resulted in either the certification or ultimate denial of many airline pilots.

Dr. Taxay became known to this office in a limited way on December 19, 1968. He was the physician of an airline pilot I had represented in the past, William S. Ewing. I had abandoned Mr. Ewing on the facts I had available in early 1968. Mr. Ewing and Dr. Taxay wanted to know if there was a chance to obtain a certificate for Mr. Ewing if certain additional testing was accomplished. I evaluated the proposal (one for arteriography and cardiac metabolism testing) and informed Mr. Ewing that if he were willing to undergo the tests and risks involved, I would be happy to look at the case again upon their completion. On April 15, 1969, after completion of testing, Dr. Taxay acting as an AME performed an examination on Mr. Ewing for a first class certificate, but declined to issue the certificate because of an abnormal electrocardiogram indicating Left Bundle

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Branch Block. The information relative to the testing Mr. Ewing had undergone and his entire case history was developed into a protocol, and furnished to Dr. Faulkner along with the first class examination. Dr. Taxay did not consult me as to whether or not he should perform a first class physical examination on a pilot after developing information pertinent to him. He did not think it improper not to issue the certificate, and then urge in a separate document that one be issued. He was never advised that this would be considered an impropriety, or in fact was considered an impropriety.

Dr. Taxay testified at the hearing on this matter on October 8, 1969, and consulted with me to its conclusion. As you know, we are all awaiting Examiner Fowler's decision. During the length of his participation, Dr. Taxay was not advised that he was acting improperly. The position he took was that of an expert, but his testimony did not vary substantially in its conclusion from that of Dr. Westura e.g., that Mr. Ewing should be permitted a certificate that would enable him to function in some flight training capacity.

Dr. Taxay's situation vis a vis Mr. Ewing is therefore summarized as follows: Mr. Ewing was his patient. Dr. Taxay reviewed his files and saw that further testing might help his patient resume some aspect of his livelihood. He had this information developed hoping that he would find agreement at the Federal Air Surgeon's office. The AME examination was only a vehicle to having the case reconsidered in light of the new information. It is significant that as an AME Dr. Taxay did not issue a certificate but placed the matter in the hands of the Federal Air Surgeon, even though he did believe some form of a certificate should be issued. There is clearly no bad faith on his part to this point.

I submit further that Dr. Taxay's appearance and consultation on the Ewing case is equally blameless. The beginnings of the case necessitated an AME, and because of his professionalism Dr. Taxay played that role in accordance with the guide furnished him. After the Federal Air Surgeon denied Mr. Ewing, Dr. Taxay's participation was as examining physician and consultant, not AME. Had he not acted as AME in the matter, there would not even be the slightest reason to suspect his ethics, though in acting as AME, he was ethical as the record will bear out. It certainly cannot be said that a doctor, who is an AME, and so acts on many cases, may not be permitted to consult or act as an expert on a case in which he plays no part as physician for the Government. We do not intend here to admit, therefore, that a conflict of interest exists under these circumstances, but because the problem has arisen, and because of the warning that Dr. Taxay has received by way of the development of the factors leading to the refusal to redesignate, he is now on notice that this practice is unacceptable to FAA. As such, Dr. Taxay is perfectly willing to comply with FAA's wishes in this area, if it will help to resolve the difficulty.

John E. Marsh, Esq.

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Well after the beginning of Dr. Taxay's involvement in Mr. Ewing's situation, I had sent him some cases to review. I had done so because I was in need of medical expertise, and because of the very impressive job Dr. Taxay was doing in factually developing the Ewing case. He did not act as AME on them, he served merely as a consultant. He has acted as AME on two and has not served as a consultant. An example of such a case is the Joseph Burrell case, currently before NTSB. The reason for Mr. Burrell's referral to Dr. Taxay for an AME work-up was that Mr. Burrell had moved into the Miami area after he became my client. He asked if I knew an AME in the area, and knowing that Dr. Taxay was competent and qualified, I recommended Dr. Taxay. Dr. Taxay's work-up of Mr. Burrell should be available to you. He had Mr. Burrell obtain ophthalmologist tests, and head x-rays before considering him for a certificate. Dr. Taxay ultimately denied Mr. Burrell. The other example of a case in which Dr. Taxay acted as AME is K. D. Wright, to be considered below.

Dr. Taxay has participated in five (5) cases as a consultant in which the airman was certified by either Dr. Siegel or the Panel. In eight (8) cases, he participated as a consultant and advised me to drop the cases as the pilots should not be certified and should not fly. He has testified in two (2) cases, Ewing and Shrage. He was a consultant only in Shrage. The Ewing matter was developed largely before he began to advise me on certain other cases. Dr. Taxay has acted as a consultant on a case currently before the NTSB - that of Piche. He was the AME on the case, and will probably testify.

Dr. Taxay has been accused by Dr. Faulkner of acting as consultant to me on a case which he knew that the Administrator would not be in favor of the pilot returning to duty. The case is K. D. Wright. Dr. Taxay has not acted as a consultant on this case. It is a psychiatric case. Dr. Taxay is an internist. What he did was give Captain Wright a first class physical, and look over his past record to ascertain whether there was cause for denial. He found such cause in the fact that Captain Wright had previously been denied, and accordingly denied him. In order to develop information concerning the reasons for the past denial, Dr. Taxay, a licensed pilot, flew with Captain Wright, having on board a psychiatrist, and a nurse to take blood pressure readings. This was the extent of his participation and it was accomplished to aid the Federal Air Surgeon in evaluating the alleged "fear of flying" in Captain Wright. No criticism was levelled at Dr. Taxay for this action at the

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time he acted. Dr. Taxay has done much the same thing by way of extra stress testing at the request of Oklahoma City on numerous cardiovascular cases after turning down the pilot. It is much the same as asking for an audiogram in the case of a pilot having hearing problems. If Dr. Taxay testifies at the Wright hearing, it will be under subpoena. Dr. Faulkner's allegation that Dr. Taxay has acted contra to a known decision of the Administrator is without foundation. First, as the matter is still in the hands of the Region, there has currently been no decision of the Administrator. Secondly, Dr. Taxay has not acted contra to the Administrator. He turned Captain Wright down, even after having performed a pertinent flight test. Moreover, Dr. Norwood, at FAA indicated to me in a meeting that the Wright case would be reconsidered by FAA if there was a change in Captain Wright's life style or status. As for consultation on the case, my consultants are Dr. Philip B. Phillips, Dr. Lucio Gatto, and Dr. Irving A. Fosberg, Ph.d. None of these gentlemen know or have spoken to Dr. Taxay.

The outline of Dr. Taxay's involvement is not extensive. It is impressive to note that in most of the cases on which he has acted as a consultant, the cases have been dropped. In five (5), the pilots have been certified by either Dr. Siegel or the Panel. Therefore, in the vast majority of the cases he has acted upon, the best interest of the public has been realized. He has testified at two hearings, and did the AME work-up on only one of these, although not certifying the pilot though he believed there should be certification. He was not advised at any time that he was in a conflict situation, nor did he act in such a manner that would render him guilty of such a charge. It is unfortunate that Dr. Taxay did the workup on Ewing, but there was no bad faith involved. He has never acted in a way that could be called unethical. His disagreements with the Administrator have always been within the framework of the Regulations. More cannot be asked of a scientist/physician.

We request, on behalf of Dr. Taxay, that these facts be made known to Dr. Siegel. Dr. Taxay should be allowed to remain as an AME, as he is a good one. You need only check with Oklahoma City to verify that fact. If he is allowed to remain, you have my word, and Dr. Taxay's, that he will not appear as an expert in a case of a pilot on whom he has performed the examination of a designated Aviation Medical Examiner if such examination is prefatory to a denial of a certificate by the Federal Air Surgeon, unless subpoenaed. It is believed that this commitment on

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on Dr. Taxay's part, while not necessary from the point of view of Dr. Taxay's ethics, should serve to allay any doubts that the Federal Air Surgeon may have concerning Dr. Taxay's activities.

Very truly yours,

Robert D. Powell

cc: The Honorable Herman Talmadge
The Honorable Richard L. Ottinger
The Honorable Spessard L. Holland
The Honorable Edward J. Gurney
The Honorable Fletcher Thompson
The Honorable Dante Fascell

RDP/pat

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

WASHINGTON, D.C. 20590

ATTACHMENT O



Smith, Pepper, Shack & L'Heureux
RECORDED
JUN 12 1970
RECORDED

10 JUN 1970

Mr. Robert D. Powell
Smith, Pepper, Shack and L'Heureux
Attorney at Law
700 Montgomery Building
1776 K Street, N.W.
Washington, D. C. 20006

Dear Mr. Powell:

Your letter of 21 May 1970 addressed to Mr. John A. Marsh, Chief, Special Projects and Appellate Branch, GC-32, has been referred for reply. I have reviewed your letter and find no new information which would lead me to designate Dr. Emil P. Taxay as an Aviation Medical Examiner for the Federal Aviation Administration at this time.

Sincerely,

A handwritten signature in cursive ink that appears to read "P. V. Siegel, M.D."

P. V. SIEGEL, M.D.
Federal Air Surgeon, AM-1

CHAPTER I ADMINISTRATIVE INFORMATION

Chapter discusses administrative information of importance to the Examiner.

Mailing address for the FAA Aeromedical Certification Branch, Oklahoma City, is as follows:

Chief, Aeromedical Certification Branch
Attention: AC-130
FAA Aeronautical Center
P.O. Box 25082
Oklahoma City, Oklahoma 73125

A. AUTHORITY OF AVIATION MEDICAL EXAMINERS

Each Aviation Medical Examiner shall have the delegated authority (a) to examine applicants for and holders of airman medical certificates for compliance with the medical standards applicable to the issuance or renewal of airman medical certificates; and (b) to issue, renew, or deny issuance or renewal of airman medical certificates to applicants or holders of such certificates based upon compliance or non-compliance with the applicable medical standards.

A medical certificate issued by an aviation medical examiner is considered to be affirmed as issued unless within 60 days after date of issuance it may be reversed, wholly or partly, by the Federal Air Surgeon or Regional Flight Surgeon or the Chief, Aeromedical Certification Branch at the Civil Aeromedical Institute. However, if within 60 days after date of issuance one of the above FAA officials requests the certificate holder to submit additional medical information, he may on his own initiative reverse the issuance within 60 days after he receives the requested information.

The denial of a medical certificate by an AME is not a denial by the Administrator and may not be appealed directly to the National

Transportation Safety Board. Reconsideration of such a denial may be requested from the Federal Air Surgeon within 30 days (Appeals procedures covered in Chap. II, p. 15.) Requests for reconsideration should be in writing addressed to the Federal Air Surgeon, Attention: Chief, Aeromedical Certification Branch, Civil Aeromedical Institute, Federal Aviation Administration, Post Office Box 25082, Oklahoma City, Oklahoma 73125.

B. SUPERVISION AND GUIDANCE OF EXAMINERS

Reports of medical examination (FAA Form 8500-8) are sent directly to the Aeromedical Certification Branch. Preaddressed mailing envelopes are provided for this purpose.

Administration of the medical certification and medical examiner programs is primarily the responsibility of the Chief, Aeromedical Certification Branch.

The Chief, Aeromedical Certification Branch will be contacted in the following situations:

1. Mailing completed reports of medical examination (FAA Form 8500-8).
2. Written inquiries concerning guidance on problem medical certification cases.
3. When information is needed in regard to the overall certification program.
4. For matters involving FAA medical certification of military personnel.
5. Questions pertaining to the overall examiner program (not individual appointments).
6. Inquiries pertaining to medical certification of applicants in foreign countries.

The appropriate Regional Flight Surgeon may be contacted at the address shown (see pages 69 and 70) in the following situations:

Inquiries pertaining to problem medical certification cases in which the Regional Flight Surgeon has initiated action.

Telephonic interpretation of medical standards or policies involving an individual airman whom the Aviation Medical Examiner is examining.

Matters regarding appointment and reappointment of individual aviation medical examiners.

Supplies of examination forms (FAA Form 8500-S) and preaddressed envelopes may be ordered from the regional office, using FAA Form 8500-11, Requisition for Medical Forms and Stationery.

Questions pertaining to investigation of aircraft accidents as covered in FAA Handbook 8025.1, Aviation Medicine Participation in Aircraft Accident Investigation.

Questions pertaining to physical examination and medical certification of Air Traffic Controllers. (See Chap. II, par. J, p. 18.)

LEGAL RESPONSIBILITIES OF DESIGNATED AVIATION MEDICAL EXAMINERS

The Federal Aviation Act of 1958 authorized the Administrator of the Federal Aviation Administration to delegate to qualified private persons certain of his statutory powers and duties, including the conduct of examinations and issuance of certificates. Designated Aviation Medical Examiners have been delegated the Administrator's authority to examine applicants for airman medical certificates and to issue or deny issuance of certificates. Approximately 475,000 applications for airman medical certificates are filed and processed each year. Very few of the medical examinations are conducted by physicians on the FAA's staff; over 90 percent are conducted by the private practitioners who have been designated to represent the Federal Aviation Administration for this purpose. The Medical Examiner is a duly appointed representative of the Administrator of the Federal Aviation Administration, with important duties and responsibilities. He

should understand the importance and responsibility of his appointment.

The consequences of a negligent certification, which would permit an qualified person to take the controls of an aircraft, can be serious for the Government, the airman, and indeed for the Medical Examiner involved. If the examination is cursory and the Examiner fails to find a disqualifying physical defect which should have been discovered in the course of a thorough and careful examination, the FAA and the Medical Examiner have placed a safety hazard in the air and must bear the responsibility for the results of such action. If the airman is thereafter involved in an accident, caused or contributed to by his disability, and as a result passengers or persons on the ground lose their lives, both the FAA and the examining physician may be subject to suit for their negligence.

Of even greater concern is the situation in which an examining physician might deliberately fail to report a disqualifying disability which he either observes in the course of his examination, or which he otherwise knows to exist. In this situation, both the applicant and the examining physician, in completing the application and medical report form, would have committed a violation of Federal criminal law, Title 18 U.S.C. 1001, which provides that —

Whoever in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully, falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or who makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

It is the policy of the Federal Aviation Administration to forward all cases of false applications for medical certificates to the Department of Justice for criminal prosecution, and this policy would be adhered to, whether the false statement be by the applicant, the examining physician, or both. In view of the pressures sometimes placed on Aviation Medical Examiners by their regular patients to ignore

is appointed or knows to exist, it is important that all physicians be aware of the Administration's firm policy in this respect.

In addition, when an airman has been issued a medical certificate which he should not have received, it is frequently necessary for the FAA to commence an action before the National Transportation Safety Board, or for the U.S. attorney to commence an action in Federal court, to obtain a return of the certificate. This laborious procedure can consume an unjustifiable amount of time and money, and while the proceeding is pending, the airman continues to exercise the privileges of his wrongfully obtained certificate.

Aviation Medical Examiners possess an important Federal responsibility. It must be exercised in the highest standards of the medical profession.

D. TENURE AND PRIVILEGES OF DESIGNATION

Designations of physicians as Aviation Medical Examiners are effective for one year unless terminated earlier by the Federal Air Surgeon as outlined in paragraph I. Redesignations are made annually, as authorized in section 183.15 of Part 183, Federal Aviation Regulations. The privileges of an AME are outlined under sections 183.21 (a) through (e) of Part 183, Federal Aviation Regulations. (See Par. U., p. 7.)

E. SENIOR AVIATION MEDICAL EXAMINERS (ATR)

Physicians newly appointed as Aviation Medical Examiners are given authority to issue only second and third class medical certificates. Senior Aviation Medical Examiners (ATR) may issue all classes of medical certificates.

Aviation Medical Examiners who desire appointment as Senior Aviation Medical Examiners, with the additional authority to issue Class I medical certificates, must submit their requests in writing to the appropriate Regional Flight Surgeon. Designations are made by the Regional Flight Surgeons, based on the following criteria in addition to that for initial designation:

1. Three years acceptable service as an AME
2. Demonstrated interest in the practice of aviation medicine
3. Participation in the total AME program
4. Need for the services of a Senior Aviation Medical Examiner in the area, based on pilot population as related to the number of Senior AMEs already available
5. Special consideration will be given to those AMEs who are pilots as well as rated Flight Surgeons

F. EVALUATION

It is the policy of the Office of Aviation Medicine to continually evaluate the performance of each AME. The Chief, Aeromedical Education Branch, is responsible for developing and administering evaluation procedures for the purpose of supplying the Regional Flight Surgeon with data to assist him in redesignating only those physicians definitely interested in the AME program.

1. Evaluation includes a review of the following:
 - a. Adequacy of professional information on Reports of Medical Examination
 - b. Error rate in certification of airmen
 - c. AME's interest in total program and availability for aircraft accident investigation
 - d. Reports from aviation community concerning the AME's professional performance
 - e. Information from medical societies and associations.
2. Toward accomplishment of this evaluation, the Chief, Aeromedical Education Branch, will furnish the Regional Flight Surgeons summaries on all physical examinations performed by the AMEs under their jurisdiction which will include:
 - a. AME's interest in total program and
 - b. Number of certificates denied or pending

- c. Number of errors in examination reports
- d. State and county in which airman resides.

REDESIGNATION

The Regional Flight Surgeon will use as primary tools for determining suitability for designation the data obtained from: The evaluation system; reports furnished by the Chief, Aeromedical Education Branch; and firsthand impressions gained through personal contacts either at aviation medical seminars or personal visits to the AME's office. The Aeromedical Education Branch will forward, on a yearly basis, prior to AME appointment anniversary date, FAA Form 8520-1, Reappointment as Aviation Medical Examiner, and AME Identification Card, to all AMEs certified by the Regional Flight Surgeons as meeting the criteria for redesignation.

TRANSFER OF DESIGNATION

When an AME transfers from one FAA region to another, his designation may be continued upon his request if the Regional Flight Surgeon of the receiving region determines there is a need based on AME versus pilots ratio in the area, and the AME's performance has been satisfactory. In such cases, the original serial number assigned the AME will be retained, with the state code changed to reflect the new location.

TERMINATION OF DESIGNATION

Federal regulations specify that a designation may be terminated for one or more of several causes, which include a finding that the representative has not properly performed his duties under the designation; the representative's services are no longer required; the representative requests termination; or for any reason the Administrator considers appropriate.

TERMINATION BASED ON PROFESSIONAL AND/OR ADMINISTRATIVE PERFORMANCE.

a. *Sub-Standard Performance.* When the Regional Flight Surgeon determines that an AME is performing in a sub-standard manner, he shall notify him of his deficiencies

and point out ways in which he can improve. After a reasonable period, he shall again review the AME's performance to determine if sufficient improvement has been made. If performance is still sub-standard, the designation shall be terminated by one of the following methods:

(1) *Termination at Annual Designation.*

If the Regional Flight Surgeon decides to terminate at the time of annual designation, he shall notify the AME in writing the reason for his action. A copy of the notification shall be sent to the Chief, Aeromedical Education Branch, AC-140.

(2) *Termination during the Appointment Year.*

If the Regional Flight Surgeon determines that termination during the appointment year is warranted, he shall provide documentation and recommend such action to the Chief, Aeromedical Educational Branch, who shall prepare a letter for the signature of the Federal Air Surgeon terminating the AME's designation.

2. TERMINATION BASED ON PERSONAL CONDUCT

If the AME is convicted of a felony or any crime involving moral turpitude, or if his personal conduct tends to bring discredit upon the Federal Aviation Administration and/or compromises the effectiveness of his appointment, the Regional Flight Surgeon shall evaluate the situation. If necessary, this Surgeon shall request the appropriate regional Investigation and Security element to investigate and furnish him documentation for transmission to the Chief, Aeromedical Education Branch. The Chief shall prepare a letter for the signature of the Federal Air Surgeon, terminating the AME's designation, if warranted by the facts developed in the evaluation or investigation.

3. TERMINATION BASED ON HEALTH

If an AME develops a serious disabling illness which renders him incapable of sound professional judgment or ability to perform

summations the Regional Flight Surgeon will investigate the situation and furnish documentation to the Chief, Aeromedical Education Branch, who shall prepare a letter for the signature of the Federal Air Surgeon, terminating the AME's designation.

4. VOLUNTARY TERMINATION

An AME's designation will terminate upon his request.

5. TERMINATION FOR OTHER REASONS

If for any other reason a Regional Flight Surgeon finds it in the best interest of the agency to terminate an Examiner, he shall, if the termination occurs at the time of annual designation, follow the procedures specified in paragraph I 1(a)(1); if termination is to be made during the appointment year, the procedures specified in paragraph I 1(a)(2) shall be followed.

J. NO "ALTERNATE" AMEs DESIGNATED

The AME is to conduct all physical examinations in his regular office. Exceptions to this are reserve officers who perform examinations on a military base at the discretion of the senior flight surgeon (military billet number is to be used), and clinic operations where another physician may be delegated to perform certain portions of the examination. In the latter case the AME shall review, certify, and assume responsibility for the accuracy and completeness of the total report of examination (and the cost may not exceed the amount normally charged for an examination conducted by one physician). For this reason the AME who plans to be absent from his office for any length of time is not permitted to conduct examinations at his temporary address and is not permitted to name an alternate examiner. During the absence of the designated examiner, applicants for airman medical certificates will be referred to another AME in the area.

K. AMEs IN RESIDENCY

AMEs who leave their practice to go into residency will be placed on inactive status and their names will be deleted from the AME

Directory. Upon completion of residency they may request reinstatement from the Regional Flight Surgeon. The original designation number will be reissued to the AME upon his redesignation if in the same state.

L. EXAMINATION FEES

The Federal Aviation Administration does not recommend fees to be charged by Examiners for the physical examination of airman applicants. It is suggested that the fee be commensurate with that established for like services in the area.

M. RELEASE OF INFORMATION

Aviation Medical Examiners will not divulge or release to anyone (other than FAA) copies of any reports prepared in connection with the examination. Requests for such information will be referred to the Chief, Aeromedical Certification Branch, Oklahoma City, Oklahoma.

N. AIRMAN DEFINITION

The Federal Aviation Act of 1958 defines "Airman" as follows:

Airman means any individual who engages as the person in command or as pilot, mechanic, or member of the crew, in the navigation of aircraft while underway; and (except to the extent the Administrator may otherwise provide with respect to individuals employed outside the United States) any individual who is directly in charge of the inspection, maintenance, overhauling, or repair of aircraft, aircraft engines, propellers, or appliances; and any individual who serves in the capacity of aircraft dispatcher or air traffic control tower operator.

O. CLASSES OF MEDICAL CERTIFICATES

The class of medical certificate for which the applicant applies will be issued if he possesses the required medical qualifications.

Regardless of the fact that an applicant may hold an airman certificate of a higher class, he need only have a *medical* certificate of a class appropriate to the airman privileges exercised (FAR 61.43). For example, an airman who

holds an Airline Transport Pilot (ATR) rating may pilot aircraft while holding only a Third-Class medical certificate so long as he limits his flying activities to those authorized for private pilots.

Listed below are the several categories of airman. Listed opposite these are the minimum classes of *medical* certificate which must be held, in addition to the appropriate airman certificate, in order to exercise the privileges of the particular activities.

| Airman Activity | Minimum required medical certificate |
|------------------------------------|--------------------------------------|
| Airline Transport Pilot | First-Class |
| Air Traffic Control Tower Operator | Second-Class |
| Commercial Lighter-Than-Air Pilot | Second-Class |
| Commercial Pilot | Second-Class |
| Flight Engineer | Second-Class |
| Flight Navigator | Second-Class |
| Free Balloon Pilot | Third-Class |
| Private Lighter-Than-Air Pilot | Third-Class |
| Private Pilot | Third-Class |
| Student Lighter-Than-Air Pilot | Third-Class |
| Student Pilot | Third-Class |
| Glider Pilot | None |
| Student Glider Pilot | None |

P. AGE REQUIREMENTS

1. There is no age restriction for medical certification.
2. Minimum age requirements for the various airman certificates (excluding *medical* certificates) are defined in the Federal Aviation Regulations Part 61, as follows:
 - a. Student pilot certificate:
 - (1) Powered aircraft: 16 years
 - (2) Gliders: 14 years
 - b. Private pilot rating:
 - (1) Powered aircraft: 17 years
 - (2) Gliders: 16 years
 - c. Commercial pilot rating: 18 years
 - d. Airline transport pilot rating: 23 years

Q. NATIONALITY REQUIREMENT

There is no restriction regarding the issuance of an FAA medical certificate to persons who are not citizens of the United States. If the applicant meets the physical standards of the class certificate for which he is applying, the Aviation Medical Examiner may issue the certificate regardless of the applicant's citizenship.

R. RE-EXAMINATION OF AN AIRMAN

A holder of a currently effective medical certificate may be required to undergo a re-examination at any time if, in the opinion of the Federal Air Surgeon or his authorized representative within the FAA, there is reasonable ground to question his continued ability to meet the same prescribed medical standards with which he complied to obtain his medical certificate (FAR 67.25(c)).

S. FAR 61.45 "OPERATIONS DURING PHYSICAL DEFICIENCY"

"Operations during physical deficiency. No person may act as a pilot in command, or in any other capacity, as a required pilot flight crewmember while he has a known physical deficiency that would make him unable to meet the physical requirements for his current medical certificate."

T. VALIDITY OF MEDICAL CERTIFICATES

1. Every medical certificate will bear the same date as the basic report of medical examination regardless of the date the certificate is actually issued.
2. A medical certificate issued by an aviation medical examiner is considered to be affirmed as issued unless within 60 days after date of issuance it may be reversed, wholly or partly, by the Federal Air Surgeon or Regional Flight Surgeon or the Chief, Aeromedical Certification Branch at the Civil Aeromedical Institute. However, if within 60 days after date of issuance one of the above FAA officials requests the certificate holder to submit additional medical information, he may on his own initiative reverse the issuance within 60 days after he receives the requested information.
 - a. A medical certificate of the First Class, for the remainder of the month of issue plus 6 calendar months; or plus 12 calendar months for activities requiring a Second Class certificate; or plus 24 calendar months for activities requiring a Third Class certificate.

ATTACHMENT B

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

AERONAUTICAL CENTER
P O BOX 25067
OKLAHOMA CITY OKLAHOMA 73128



27 March 1970

In reply
refer to: MIDS 0-071297

Mr. James Gallagher Worth
751 Oriole Drive
Miami Springs, Florida 33166

Dear Mr. Worth:

Thank you for your prompt response to our request for data to enable us to further evaluate your electrocardiography of 2 September 1969.

Based on a review of the information sent to us by Doctor Taxay, we are pleased to advise you that the medical certificate you now hold is valid as issued.

We appreciate your cooperation, and the assistance of Doctor Taxay.

Sincerely yours,

AUDIE W. DAVIS, M. D.
Chief, Aeromedical Certification Branch, AC-130
Civil Aeromedical Institute

cc: Emil F. Taxay, M. D., F.A.C.P.

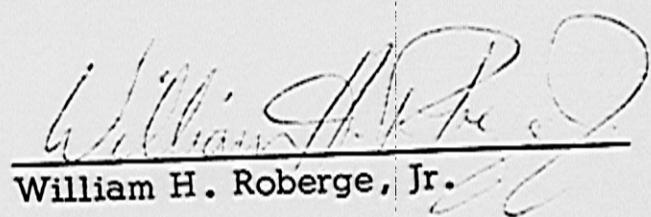
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief for
Petitioner and Appendix were served by hand this 16th day of
February, 1971, on:

Leonard Schaitman, Esq.
Room 3712
Department of Justice
Washington, D. C.



William H. Roberge, Jr.

No. 24,837

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMIL P. TAXAY, M.D.,

Petitioner,

v.

JOHN H. SHAFFER, Administrator of the Federal
Aviation Administration;

PETER V. SIEGEL, M.D., Federal Air Surgeon,
Federal Aviation Administration;

HARRY M. FAULKNER, M.D., Regional
Flight Surgeon, Southern Region,
Federal Aviation Administration,

Respondents.

ON PETITION FOR REVIEW OF ACTION BY THE FEDERAL AVIATION
ADMINISTRATION

BRIEF FOR THE RESPONDENTS

L. PATRICK GRAY, III,
Assistant Attorney General,

MORTON HOLLANDER,
LEONARD SCHAITMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 13 1971

Nathan J. Paulson
CLERK

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMIL P. TAXAY, M.D.,

Petitioner,

v.

JOHN H. SHAFFER, Administrator of
the Federal Aviation Administration;
PETER V. SIEGEL, M.D., Federal Air Surgeon,
Federal Aviation Administration;
HARRY M. FAULKNER, M.D., Regional Flight
Surgeon, Southern Region, Federal Aviation
Administration,

Respondents.

ON PETITION FOR REVIEW OF ACTION BY THE FEDERAL AVIATION
ADMINISTRATION

BRIEF FOR THE RESPONDENTS

ISSUES PRESENTED *

1. Whether the petition for review should be dismissed for lack of jurisdiction since the challenged administrative action is not an "order" of the FAA Administrator within the meaning of Section 1006(a) of the Federal Aviation Act, 49 U.S.C. 1486(a).
2. Whether the FAA's action in not redesignating petitioner as an Aviation Medical Examiner was consistent with the Federal Aviation Act, Federal Air Regulations, and with the requirements of the due process clause of the United States Constitution.

*This case has not previously been before this Court.

1/
STATEMENT OF THE CASE

1. Nature of the Case

Petitioner Taxay, a private physician, was designated by the FAA Administrator to serve as an Aviation Medical Examiner ("AME") pursuant to Section 314 of the Federal Aviation Act, 49 U.S.C. 1355, and 14 C.F.R. Part 183 (see App. 24A; Supp. App. 2S, 12S-13S). Petitioner's AME appointment, by its terms, was to expire annually, subject to renewal at the FAA's discretion (14 C.F.R. 183.15(a); App. 24A; Supp. App. 13S). On March 25, 1970, the FAA's Regional Flight Surgeon notified petitioner that "The decision has been reached that it would not be in the best interest of the Federal Aviation Administration to re-appoint you as an Aviation Medical Examiner. Accordingly, your appointment which expires this month will not be renewed" (App. 24A).

On July 8, 1970, petitioner filed with the FAA Administrator a complaint challenging, and demanding an investigation of, the FAA's action in not reappointing petitioner (App. 2A-16A). Petitioner's complaint was purportedly filed pursuant to Section 1002(a) of the Federal Aviation Act, 49 U.S.C. 1482(a), which

1/The Statement of the Case in the Brief for Petitioner (e.g., top of p. 17) contains numerous assertions which are unfounded and without record citations.

2/ "App." refers to the Appendix to the Brief for Petitioner, which contains portions of the administrative record filed by the FAA with this Court. "Supp. App." refers to the Supplementary Appendix, which contains the remaining portions of the administrative record filed with this Court.

provides that any person may file with the FAA Administrator a complaint as to anything done or omitted to be done "by any person" in violation of the Act and Federal Air Regulations.

On October 23, 1970, the FAA Administrator rejected petitioner's complaint, noting, inter alia, that "there does not exist any reasonable basis for reversal of the decision * * * not to redesignate petitioner," and that "the Complaint does not contain facts which would warrant further investigation * * * "(App. 1A).

On November 25, 1970, petitioner, purportedly acting pursuant to Section 1006(a) of the Federal Aviation Act, 49 U.S.C. 1486(a), filed the instant petition to review the October 23, 1970 "order" of the FAA Administrator, "which indicates refusal to process, investigate, and conduct a hearing requested in a complaint filed on July 8, 1970 * * * "(Supp. App. 1S-6S).

2. Aviation Medical Examiners Under the Federal Aviation Act and Federal Air Regulations

The Federal Aviation Act of 1958 authorizes the FAA Administrator, after appropriate examination and testing, to issue airman certificates to pilots and other airmen. 49 U.S.C. 1422. The Administrator is also authorized to reexamine airmen and to suspend or revoke their certificates where required for air safety. 49 U.S.C. 1429. The Administrator is further authorized, after appropriate examination and testing, to issue and review certificates for aircraft, aircraft equipment, air carriers, air navigation facilities, and air agencies. 49 U.S.C. 1423-1429.

The Federal Aviation Act provides that, in exercising his statutory powers, the FAA Administrator may "delegate to any

properly qualified private person" any work, business or function respecting "the examination, inspection, and testing necessary to the issuance" of airman and other certificates, and "the issuance of such certificates in accordance with standards established by" the Administrator. 49 U.S.C. 1355(a). The Act expressly provides that the Administrator's "delegation of powers and duties to private persons" shall be "subject to such regulations, supervision and review as he may prescribe" and that "The Administrator may establish the maximum fees which such private persons may charge for their services and may rescind any delegation made by him pursuant to this subsection at any time and for any reason which he deems appropriate" (49 U.S.C. 1355(a); emphasis added).

Part 183 of the Federal Air Regulations describes the Administrator's requirements for "designating private persons to act as representatives of the Administrator" in "examining, inspecting, and testing persons and aircraft for the purpose of issuing airman and aircraft certificates." 14 C.F.R. 183.1. Part 183 further "states the privileges of these representatives and prescribes rules for their exercising of those privileges." 14 C.F.R. 183.1.

Thus, Part 183 states that the Federal Air Surgeon, or his authorized FAA representative, may select Aviation Medical Examiners from qualified physicians who apply (14 C.F.R. 183.11(a)),

3/
and that unless sooner terminated under 14 C.F.R. 183.15(c)), a "designation as an Aviation Medical Examiner is effective for 1 year after the date it is issued, and may be renewed for additional periods of 1 year in the Federal Air Surgeon's discretion" (14 C.F.R. 183.15(a); emphasis added). Part 183 describes AME privileges as including: (1) accepting applications for physical examinations necessary for issuing medical certificates to pilots and other airmen; (2) conducting these physical examinations under the general supervision of the Civil Air Surgeon or appropriate senior regional flight surgeon; (3) issuing or denying medical certificates in accordance with FAA regulations (Part 67) subject to reconsideration by the Civil Air Surgeon or his authorized FAA representative; (4) issuing student pilot certificates; and (5) participating in investigating aircraft accidents, as requested. 14 C.F.R. 183.21.

Each physician designated as an FAA Aviation Medical Examiner is given the Guide for Aviation Medical Examiners issued by the 4/
FAA's Office of Aviation Medicine (see Supp. App. 7S-88S; App. 2^{4A}).

3/14 C.F.R. 183.15(c) states that an AME designation terminates "upon the written request" of the AME; upon a finding by the Administrator that the AME has not properly performed his duties; upon the AME no longer being needed by the Administrator; or "for any reason the Administrator considers appropriate."

4/The FAA filed with this Court the AME Guide (Supp. App. 7S-88S) which was in effect in June 1970. The AME Guide in effect during petitioner's AME service was substantially similar. All citations to the AME Guide in this brief refer to the June 1970 edition and to the predecessor edition issued in January 1968. Copies of the January 1968 edition will be handed up to the Court at the oral argument of this matter.

The AME Guide states that each AME shall have the delegated authority to examine applicants for, and holders of, airman medical certificates for compliance with applicable medical standards, and to issue, renew or deny issuance or renewal of such certificates "based upon compliance or noncompliance with the applicable medical standards" (Supp. App. 11S ^{5/}). The AME Guide emphasizes that each AME, as "a duly appointed representative" of the FAA Administrator, exercises "an important Federal responsibility" which "must be exercised in the highest standards of the medical profession" (Supp. App. 12S-13S ^{6/}). As the AME Guide notes, if an AME fails to find a disqualifying physical defect which should have been discovered in the course of a thorough and careful examination, the FAA and the AME "have placed a safety hazard in the air and must bear the responsibility for the results of such action" (Supp. App. 12S ^{7/}). The AME Guide describes the medical

^{5/}The AME Guide states that newly appointed AMEs are given authority to issue only second and third class medical certificates, while Senior Authorized Medical Examiners may issue all classes of medical certificates (Supp. App. 13S ;see 14 C.F.R. Part 67).

The AME Guide further states that a medical certificate issued by an AME is considered to be affirmed as issued unless reversed by FAA officials within 60 days, and that denial of a medical certificate by the AME is not a denial of the Administrator, but may be appealed to the Federal Air Surgeon (Supp.App.11S). The airman may petition the National Transportation Safety Board for review of adverse action by the Federal Air Surgeon, and the Board will then conduct a formal hearing "under regular court proceedings" at which the airman "should be represented by counsel and may subpoena witnesses to testify in his behalf" (Supp.App. 26S).

^{6/}The AME Guide states that the FAA does not recommend fees to be charged by the AME, but suggests that "the fee be commensurate with that established for like services in the area" (Supp. App. 15S).

^{7/}As the AME Guide notes, 475,000 airman applications are filed and processed each year, and AMEs perform the examination in 99 percent of the cases (Supp. App. 12S).

conditions for which certificates will be denied or deferred, but expressly notes that "it is impossible to list in the Regulations, or in a Guide of this nature, all of the conditions which may be a hazard for safe operation of aircraft. For this reason, this Guide has been prepared to assist the AME in the exercise of his best clinical judgment in the assessment of fitness for medical certification" (Supp. App. 46S). The AME Guide also warns AMEs to be alert to "the pressure sometimes placed" on AMEs "by their regular patients to ignore a disqualifying physical defect which the physician knows to exist" (Supp. App. 12S-13S). The AME Guide further requires the AME to "form and report a general impression of the emotional state of the applicant" and to refer appropriate cases for psychiatric evaluation (Supp. App. 70S).

The AME Guide specifically states that AME designations are effective for one year, unless earlier terminated, and that redesignations are made annually (Supp. App. 13S). The AME Guide states that it is FAA's policy "to continually evaluate the performance of each AME" and that an AME's designation may be terminated if his "personal conduct tends to bring discredit upon the Federal Aviation Administration and/or compromises the effectiveness of his appointment" (Supp. App. 13S-14S).

3. The FAA's March 25, 1970 Action Declining to Reappoint Petitioner as an Aviation Medical Examiner

Petitioner Taxay was designated as an AME in 1961 and was redesignated annually through 1969 (see Supp. App. 2S,13S ;App. 24A). On March 25, 1970, Dr. Faulkner, the FAA's Southern Regional Flight

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Surgeon, as delegatee of the Federal Air Surgeon,^{8/} notified petitioner, who was then a Senior AME, that his "appointment which expires this month will not be renewed" (App. 24A). The Regional Flight Surgeon stated (ibid.):

In keeping with the agency's policy of annual evaluation of the Examiner Program, we have reviewed your record of activity as a designated representative of this agency. The decision has been reached that it would not be in the best interest of the Federal Aviation Administration to re-appoint you as an Aviation Medical Examiner. Accordingly, your appointment which expires this month will not be renewed.

After 30 March 1970, please return to this office your Aviation Medical Examiner identification card, AME Guide, report forms, and other Federal Aviation Administration material you may have. We will be unable to accept any airmen medical examinations performed by you after that date.

We wish to thank you for your past performance that has served the needs of the agency.

4. Events Subsequent to the FAA's March 25, 1970 Action

On April 6, 1970, an attorney named Robert D. Powell, acting on behalf of petitioner, wrote Dr. Siegel, the Federal Air Surgeon, concerning Dr. Faulkner's action declining to reappoint petitioner (App. 25A-26A). Powell's letter stated that "There are no reasons stated for the decision" but recognized that "a designee serves for a period of one year and renewal is at the discretion of the Administrator" (App. 25A). Powell's letter further stated that "I would like to appeal to your sense of fairness and ask that you

^{8/}The designation function was delegated to the Regional Flight Surgeon by FAA Order 8520.2A (Supp. App. 89S-96S).

look into the failure to redesignate" petitioner, and requested "a meeting * * * to explore the reasons for the expiration without redesignation in this instance" (App. 25A-26A). And on April 7, 1970, Powell wrote to Dr. Faulkner, the Regional Flight Surgeon, asking him to "definitively state your reasons for the failure to redesignate" petitioner (App. 27A).

On April 10, 1970, the FAA's Southern Regional Counsel replied to Powell's April 7 letter to the Regional Flight Surgeon (App. 28A). The Regional Counsel's letter noted Powell's "awareness that designation of private persons to act as representatives of the Administrator, under the law and regulations, is purely a discretionary matter" (ibid.). The Regional Counsel further stated that Dr. Faulkner's determination was made "pursuant to authority delegated to him" and that "It is believed that you and Dr. Taxay are aware of the reasons for such determination" (ibid.).

On April 13, 1970, Powell replied to the Regional Counsel's April 10 letter, stating that "Perhaps Dr. Taxay does 'know why', but it is still the obligation of Dr. Faulkner's office, in reaching an administrative determination, to specify the reasons for the action" (App. 29A-30A). Accordingly, Powell again demanded "a specific description of the reason for the refusal of Dr. Faulkner to renew the designation of Dr. Taxay as an Aviation Medical Examiner" (App. 29A).

On April 20, 1970, the Regional Counsel replied to Powell's April 13 letter by stating (App. 31A):

As you are aware, Dr. Taxay, while serving as a designated representative of the Administrator and identifying himself accordingly, has appeared as an expert medical witness in opposition to the position of the Administrator in proceedings before the National Transportation Safety Board.

You have advised Dr. Faulkner that you are using Dr. Taxay as a consultant in opposing the Administrator in contested medical certification cases and there is no doubt about this activity.

Certainly there is no question as to Dr. Taxay's right to serve as consultant to whomever he pleases or to testify for whomever he chooses. However, it is not sensible or appropriate to continue his designation as a representative of the Administrator under the existing circumstances.

The circumstances described above are considered to fully support and justify the determination made by Dr. Faulkner that Dr. Taxay's designation should not be renewed.

And on April 24, 1970, the Federal Air Surgeon replied to Powell's April 6 letter, stating that "it is difficult for an individual to both serve as a representative of the Administrator and as a representative against the Administrator" and that "We welcome Dr. Taxay's future expert medical opinion in the interest of fairness and justice but must reaffirm that this cannot be as a designated aviation medical examiner" (App. 32A). On the same day, the Federal Air Surgeon responded to Dr. Taxay's own letter of April 1, 1970 concerning the failure to reappoint him (App. 33A).

In this letter, the Federal Air Surgeon stated (ibid.):

* * * As you know, the designation of aviation medical examiners is discretionary with the Administrator. As an aviation medical examiner you have served as a representative of the Administrator. However, over the past several months you have also testified in behalf of pilots against the Administrator.

You have served so regularly as a paid consultant to attorneys opposing the Administrator in particular cases, that, without any reflection on you, it is preferable from this agency's standpoint not to continue you at the same time in the position of an aviation medical examiner, in which you represent the Administrator and assist in carrying out some of the Administrator's authority and responsibility.

We do not challenge your qualifications and we welcome you to continue to provide expert medical opinion in the interest of fairness and justice. We do not feel it would be in the best interests of the Federal Aviation Administration to have you continue as a designated representative of the Administrator.

On May 1, 1970, Powell wrote to the Federal Air Surgeon to request a meeting "in advance of filing an action in District Court * * *" (App. 38A). Thereafter, FAA officials met with Powell, and, on May 21, 1970, Powell wrote the FAA's General Counsel a letter in which he set forth "Dr. Taxay's position" concerning the failure to reappoint him an AME (App. 39A-43A).

In his May 21, 1970 letter, Powell conceded that petitioner, acting as an AME, had examined and declined to issue a certificate for a pilot named Ewing, and that, subsequently, petitioner testified on Ewing's behalf at an appeal hearing before an examiner of the National Transportation Safety Board (App. 39A-40A). Powell's letter explained the circumstances of petitioner's testimony in Ewing's case, arguing that it was justified and "blameless", that there was no conflict of interest and "no bad faith", and that in any event petitioner "is now on notice that this practice is unacceptable to FAA" (App. 39A-40A). Again, Powell conceded (App. 42A) that "it is unfortunate that Dr. Taxay did the workup

on Ewing", but promised (App. 42A-43A) that, if petitioner were reappointed, petitioner:

will not appear as an expert in a case on a pilot on whom he has performed the examination of a designated Aviation Medical Examiner if such examination is prefatory to a denial of a certificate by the Federal Air Surgeon, unless subpoenaed. It is believed that this commitment on Dr. Taxay's part, while not necessary from the point of view of Dr. Taxay's ethics, should serve to allay any doubts that the Federal Air Surgeon may have concerning Dr. Taxay's activities.

Powell's letter also conceded that petitioner had testified against the Administrator in another case (Shrage) before the National Transportation Safety Board on which he had not been AME; that he would probably testify before the Board in a third case (Pioche) in which he was the AME; and that he had also served as a consultant for Powell on a number of pilot cases (App. 41A-42A). Powell's letter argued that the circumstances of these activities demonstrated that petitioner had not acted "in any way that could be called unethical" (App. 42A). Powell did not offer to stop employing petitioner as a consultant (App. 41A-43A).

On June 10, 1970, the Federal Air Surgeon wrote Powell that he had reviewed Powell's May 21 letter "and find no new information which would lead me to redesignate Dr. Emil P. Taxay as an Aviation Medical Examiner for the Federal Aviation Administration at this time" (App. 44A).

Subsequent to its March 25, 1970 action in not reappointing petitioner as an AME, the FAA received a number of inquiries about petitioner from various members of the legislative branch of our Government. Thus, on May 27, 1970, Senator Gurney wrote the

FAA Administrator, stating that petitioner should be "commended" for his consultation with Mr. Powell's law firm "in 20 cases involving pilots," including two cases in which petitioner testified before the National Transportation Safety Board (Supp. App. 105S-106S). On June 16, 1970, the FAA Administrator replied to Senator Gurney as follows (App. 36A-37A):

Like other government agencies, the Department of Transportation does not permit its employees to take positions adverse to the Department in legal proceedings before the Department and third parties. (Employees may always give factual testimony.) An aviation medical examiner is not an employee, but since he holds a delegation to perform a governmental function on behalf of the Federal Aviation Administration, he is, in this respect, in a position analogous to an employee's. He received a certain amount of training and information and becomes privy to FAA's views on medical facts critical to its decisions. The relationship involves a degree of trust and confidence.

It may well be that sometimes the interest of justice is served by an aviation medical examiner testifying as an expert against the FAA position, but an applicant's interest in justice in his individual case must be balanced against the general interest in justice of the body politic which FAA must represent. It seems to us that in the area of medical certification of airmen as in other areas where individual and public interest often collide, no man can essentially occupy both sides. Furthermore, if aviation medical examiners were generally available as expert witnesses against FAA, litigants would prefer them to experts not connected with the government because of their prestige, which would neither be in the public interest nor in that of other qualified members of the legal profession.

We attempt to attract the services of highly qualified men as aviation medical examiners and therefore have attempted to impose as few restrictions on them as possible. We do not object to an examiner occasionally taking an applicant's side in proceedings before FAA when he feels conscientiously impelled to do so in the interest of individual justice. But it is another thing if the examiner makes it an organized course of conduct, and this is the present case. For this reason

we have not renewed the delegation to Dr. Taxay when it expired by its own terms.

We submit that this explanation supports FAA's action. We hope that we have made our position clear and that we have shown a rational basis for our action which was taken in the best interest of aviation safety.

On September 18, 1970, the FAA also responded to Senator Cranston's inquiry about petitioner, noting (Supp. App. 97S):

Under Federal Aviation Regulations 183.15 the designation of aviation medical examiners is discretionary. As an aviation medical examiner, Dr. Taxay served as a representative of the Administrator. Over the past months, he has also testified in behalf of pilots against the Administrator. In fact, Dr. Taxay has served so regularly as a paid consultant to attorneys opposing the Administrator in particular cases, that, without any reflection on Dr. Taxay, it is preferable from this agency's standpoint not to continue him at the same time in the position of aviation medical examiner, in which he represents the Administrator and assists in carrying out some of the Administrator's authority and responsibility.

We do not challenge Dr. Taxay's qualifications and we do welcome him to continue to provide expert medical opinion in the interest of fairness and justice. We do not feel that it would be in the best interest of the Federal Aviation Administration to have Dr. Taxay continue as a designated representative of the Administrator. 9/

9/A similar reply was sent to Congressman Edwards on August 25, 1970, and to Senator Gurney, in response to their inquiries concerning petitioner (Supp. App. 100S, 107S).

Senator Holland also informed the FAA of his interest in petitioner's case. On April 9, 1970, the FAA responded to Senator Holland's inquiry as follows (App. 34A-35A):

As you may know, appointments as an aviation medical examiner are made for a term of one year. Under the Federal Aviation Act of 1958 and the Federal Aviation Regulations such appointments and renewal of appointments are made at the discretion of the Administrator.

While serving as a designated representative of the Administrator and identifying himself as such, Doctor Taxay has appeared as an expert medical

(to be continued)

5. Petitioner's July 8, 1970 Complaint Against the
FAA Administrator

On July 8, 1970, petitioner, purportedly acting under Section 1002(a) of the Federal Aviation Act, 49 U.S.C. 1482(a), filed with the FAA Administrator a complaint directed against the Administrator himself, and against Drs. Siegel and Faulkner, the Federal Air Surgeon and Southern Regional Flight Surgeon (App. 2A-16A). Petitioner's complaint asserted that the FAA's failure to

9/continued

witness against the Administrator in hearings before the National Transportation Safety Board. The appearances against the Administrator have been cases in which the Administrator has felt there was valid medical evidence that an airman did not meet the medical standards set forth in Part 67 of the Federal Aviation Regulations.

Mr. Robert Powell is an attorney who devotes a major portion of his practice to representing members of the Air Line Pilots Association in such hearings before the National Transportation Safety Board. Mr. Powell personally advised our Regional Flight Surgeon that he is using Doctor Taxay as a consultant. This is borne out in fact. At this time Doctor Taxay is quite actively involved in helping Mr. Powell develop his case against the Administrator in the instance of an ALPA pilot whom Doctor Taxay knows the Administrator does not feel is qualified under the regulations for medical certification. There are other instances in which Doctor Taxay has written an individual airman taking the Administration to task for its action in denying the individual medical certification.

Characteristically, in none of these instances has Doctor Taxay bothered to determine from the Administration's medical personnel what facts formed the basis of the Administrator's actions.

Certainly, we do not question Doctor Taxay's right to serve as a consultant to whomever he pleases or to testify for whomever he chooses. On the other hand, it is not sensible to continue his designation as a representative of the Administrator under the existing

(to be continued)

reappoint him was arbitrary and had caused him to lose "a portion ^{10/} of his practice that amounted to approximately \$600.00 per year" and the opportunity to gratify his "scientific interest in aviation medicine" by participation in AME and AME-related programs (App. 15A). Petitioner's complaint further asserted that the FAA's correspondence subsequent to its March 25, 1970 action made "serious charges" which he had never had the opportunity to rebut (ibid.). Petitioner's complaint demanded that the Administrator order petitioner's reinstatement as an AME, or alternatively, conduct "an investigation" of the circumstances surrounding FAA's refusal to reappoint him, "by means of an evidentiary hearing at which Plaintiff will have a full opportunity to learn the true nature of the charges against him, to cross-examine witnesses presented by the Federal Aviation Administration, and to present his position concerning this matter through documentary and testimonial evidence" (App. 16A).

9/cont'd

circumstances. We consider his actions to represent a form of conflict of interest and to compromise his effectiveness as a designated representative of the Administrator.

Doctor Taxay's appointment as an Aviation Medical Examiner expired in March 1970. Because of such actions outlined above, it was determined not to be in the best interest of the Administration to renew his appointment.

10/According to the complaint, petitioner "is currently practicing medicine in Miami, Florida" and "sees approximately 150 patients a week, about 15 per cent of whom are pilots" (App. 2A).

On October 23, 1970, the FAA Administrator replied to petitioner's "complaint" as follows (App. 1A):

Upon receipt of the Complaint, we caused it to be referred for consideration by an Office unrelated to either the Office of Aviation Medicine or the Office of the General Counsel. That Office has furnished to us, and we have reviewed, their independent evaluation and recommendation concerning the action taken by Dr. Peter V. Siegel, M.D., the Federal Air Surgeon, and Dr. Harry Faulkner, M.D., Regional Flight Surgeon, Southern Region, under authority delegated to them. From a review and consideration of both the Complaint and the report, we have concluded that there does not exist any reasonable basis for reversal of the decision made by Dr. Siegel and Dr. Faulkner not to redesignate Dr. Taxay.

As we are of the opinion that the Complaint does not contain facts which would warrant further investigation, we therefore consider this matter dismissed without the necessity for additional action.

On November 25, 1970, petitioner, purportedly acting pursuant to Section 1006(a) of the Federal Aviation Act, 49 U.S.C. 1486(a), filed the instant petition to review the October 23, 1970 "order" of the FAA Administrator, "which indicates refusal to process, investigate, and conduct a hearing requested in a complaint filed on July 8, 1970 * * *" (Supp. App. 1S-6S).

ARGUMENT

I.

THE PETITION FOR REVIEW SHOULD BE DISMISSED FOR LACK OF JURISDICTION SINCE THE CHALLENGED ADMINISTRATIVE ACTION IS NOT AN "ORDER" OF THE FAA ADMINISTRATOR WITHIN THE MEANING OF SECTION 1006(a) OF THE FEDERAL AVIATION ACT, 49 U.S.C. 1486(a).

Contrary to petitioner's assumption (Brief for Petitioner, pp. 19-22), the jurisdictional question before this Court is not whether the FAA's action "operates with a final effect" upon

petitioner, so that petitioner's claims are "ripe" enough for judicial consideration. Rather, the question is whether Congress conferred upon this Court jurisdiction to review directly the administrative action complained of by petitioner.^{11/} Specifically, the question is whether the FAA's action is an "order" of the FAA Administrator within the meaning of Section 1006(a) of the Federal Aviation Act, 49 U.S.C. 1486(a). We show below that the FAA's action is not an "order" of the FAA Administrator within the meaning of Section 1006(a), and, therefore, that the petition for review should be dismissed for lack of jurisdiction.

The Federal Aviation Act authorizes and empowers the FAA Administrator to promote the public interest in the field of civil aeronautics and air commerce. 49 U.S.C. 1303, 1346. Under the Act, the Administrator fulfills his substantive functions by acting in both a regulatory and a quasi-judicial capacity. Thus,

11/See A.F. of L. v. Labor Board, 308 U.S. 401, 404 (1940):

The Court of Appeals for the District of Columbia, like the several circuit courts of appeals, is without the jurisdiction over original suits conferred on District Courts by §24 of the Judicial Code, as amended. 28 U.S.C. §41. Such jurisdiction as it has, to review directly the action of administrative agencies, is specially conferred by legislation relating specifically to the determinations of such agencies made subject to review, and prescribing the manner and extent of review.

See also Shaw v. United States, 93 U.S. App. D.C. 300, 209 F.2d 811, 813 (C.A.D.C., 1954), recognizing that this Court "has only those powers which Congress by statute has conferred."

the Administrator acts in a regulatory capacity when he issues: (1) "air traffic rules and regulations governing the flight of aircraft" (49 U.S.C. 1348(c)); (2) "rules for the prevention of collision between aircraft" (*ibid.*); and (3) "minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety" (49 U.S.C. 1421(a)). The Administrator also acts in a quasi-judicial capacity, as when he issues "orders" compelling airmen, air carriers, and other persons to comply with the Federal Aviation Act or Federal Air Regulations. 49 U.S.C. 1482(c). In this connection, we note that 49 U.S.C. 1485(f) provides that "Every order of the Administrator * * * shall set forth the findings of fact upon which it is based, and shall be served upon the parties to the proceeding and the persons affected by such order."

The distinction between the Administrator's substantive quasi-judicial and regulatory capacities is carried forward in the "judicial review" section of the Act. Section 1006 of the Act, 49 U.S.C. 1486, provides that any "order" issued by the ^{12/} FAA Administrator or the Civil Aeronautics Board shall be subject to direct review by the Courts of Appeals (subsection (a)) and that "Findings of fact by the Board or Administrator, if supported by substantial evidence, shall be conclusive" (Subsection (e)). As

^{12/}The Civil Aeronautics Board similarly issues "orders" in the exercise of quasi-judicial functions (see 49 U.S.C. 1371(n)(5) and 1429) and acts in a regulatory capacity (see 49 U.S.C. 1324(a)). In 1966, certain functions of the Board were transferred to the National Transportation Safety Board. See Pub. Law 89-670, 80 Stat. 931.

the foregoing provisions indicate, Congress intended to provide for direct Court of Appeals review of the FAA Administrator's "orders" containing "findings of fact," issued in his quasi-judicial capacity, but not to provide for direct Court of Appeals review over the Administrator's exercise of his regulatory functions, such as the issuance of "regulations", "rules" and "standards". See National Business Aircraft Association, Inc. v. Volpe and Shaffer, C.A.D.C., No. 22,636, decided April 22, 1969, where this Court dismissed for lack of jurisdiction a petition for direct review of the "Special Air Traffic Rules and Airport Traffic Patterns" issued by the FAA to alleviate traffic congestion at certain airports.

It is equally clear that, in enacting Section 1006 of the Act, Congress intended to limit direct Court of Appeals review to the Administrator's exercise of his substantive functions under the Act (acting in a quasi-judicial capacity), but not to provide for direct Court of Appeals review of the Administrator's internal, administrative actions. For example, Congress certainly did not intend to provide for direct Court of Appeals review of claims that the Administrator improperly failed to renew contracts entered into by him, such as contracts for the rental of office space (see 49 U.S.C. 1344). Similarly, Congress did not intend to provide for direct Court of Appeals review of the internal, administrative action of the Administrator in engaging or refusing to reappoint private physicians to act as his representatives in issuing medical certificates to pilots and other airmen. This conclusion is confirmed by the fact that while the Act provides

that any "order" of Administrator, made subject to direct Court of Appeals review, must "set forth the findings of fact upon which it is based" (49 U.S.C. 1485(f), 1486(a) and (e)), no "findings of fact" are required in the case of the Administrator's selection of his delegates or other internal administrative actions taken by him. Indeed, the "delegation" section of the Act, 49 U.S.C. 1355(a), expressly states that the Administrator may delegate his powers and duties to private persons "subject to such regulations, supervision and review as he may prescribe" and that he "may rescind any delegation made by him pursuant to this subsection at any time and for any reason which he deems appropriate." There is no provision in the "delegation" section for the issuance of "orders" or the making of "findings of fact."

In an apparent attempt to avoid the fact that he is seeking direct Court of Appeals review of an internal, administrative action of the Administrator, petitioner argues that he is seeking review of the Administrator's "order" dismissing petitioner's "complaint" filed pursuant to Section 1002(a) of the Act, 49 U.S.C. 1482(a) (Brief for Petitioner, p. 21). However, it is perfectly clear that Section 1002(a) has absolutely no application to petitioner's case, and that there is no merit to petitioner's bootstrap attempt to vest jurisdiction in this Court.

Section 1002 of the Act, 49 U.S.C. 1482, provides that "[a]ny person may file [a complaint] with the Administrator" regarding a violation of the Federal Aviation Act or regulations "by any person"; that "the Administrator" shall dismiss or investigate such complaints; that "the Administrator" may conduct investigations

of violations on his own initiative; and that, if, after a hearing, "the Administrator" finds a violation of any provision of the Federal Aviation Act or regulations, "the Administrator * * * shall issue an appropriate order to compel such person to comply therewith." As is plain from the face of the statute, Section 1002 was not designed to accommodate complaints directed against the Administrator. For Congress certainly did not intend that the Administrator determine whether he should investigate himself, carry out such investigation, and then issue "an appropriate order to compel" himself to comply with the law.

That the purpose of Section 1002 was to permit investigations of third parties, such as the pilot who disobeys air traffic regulations or the airline which equips its planes improperly, is borne out by the definition of the term "person" for the purposes of the Federal Aviation Act. Section 102(27) of the Act, 49 U.S.C. 1301(27), specifies that:

"Person" means any individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof.

Thus, the Administrator, when acting in his official capacity, is not a "person" under the Act and when Section 1002 authorizes

the filing of a complaint against "any person," the Administrator
^{13/}
is not included in the term.

It need only be added that this Court has already heard arguments in another case (International Navigators Council of America v. Shaffer, Dkt. No. 24,302) involving the question of whether Section 1002 was designed to accommodate complaints requesting the Administrator to investigate himself. Petitioner in the instant case apparently concedes (Brief for Petitioner, pp. 21-22) that a decision in the INCA case may render "academic" the jurisdictional issue presented here.

II.

THE FAA'S ACTION IN NOT REDESIGNATING PETITIONER AS AN AVIATION MEDICAL EXAMINER WAS CONSISTENT WITH THE FEDERAL AVIATION ACT, FEDERAL AIR REGULATIONS, AND WITH THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

1. Section 314(a) of the Federal Aviation Act, 49 U.S.C. 1355(a), provides that the FAA Administrator may delegate his powers and duties to private persons "subject to such regulations, supervision, and review as he may prescribe" and that the Administrator "may rescind any delegation made by him pursuant to this subsection at any time and for any reason which he deems appropriate" (emphasis added). The Administrator's Regulations

^{13/}At the risk of belaboring this obvious point, we also note that if the Administrator were a person under Section 1002(a), Section 1002(b), which permits the Administrator to conduct an investigation on his own initiative, would be surplusage since the Administrator would be authorized under Section 1002(a) which authorizes the filing of a complaint by "[a]ny person" to file a complaint with himself. And, although it may be argued that "Administrator" is subsumed within the category "individual," there is no term in the definition of "person" which could conceivably incorporate the Civil Aeronautics Board, which also is vested by Section 1002 with investigatory powers parallel to those of the Administrator.

governing the designation of Aviation Medical Examiners expressly state that "a designation as an Aviation Medical Examiner is effective for 1 year after the date it is issued, and may be renewed for additional periods of 1 year in the Federal Air Surgeon's discretion" (14 C.F.R. 183.15(a)). Thus, the FAA acted in full accord with the Federal Aviation Act and Federal Air Regulations when, on March 25, 1970, it notified petitioner that "The decision has been reached that it would not be in the best interest of the Federal Aviation Administration to re-appoint you as an Aviation Medical Examiner. Accordingly, your appointment which expires this month will not be renewed" (App. 24A).

There is no merit in petitioner's attempt (Brief for Petitioner, pp. 23, et seq.) to generate a constitutional attack upon the FAA's action in not reappointing him as an AME. A similar attack was rejected by the Supreme Court in Cafeteria Workers v. McElroy, 367 U.S. 886 (1961). The Supreme Court's decision in Cafeteria Workers is dispositive of petitioner's constitutional claims.

In Cafeteria Workers, a cook at the Naval Gun Factory was deprived of her security badge without notice, hearing or statement of reasons. She was thus unable to work at the factory, although she could, of course, obtain work as a cook elsewhere. No charges of disloyalty were made. The Court held that there had been no violation of the Fifth Amendment:

The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest * * *. The very nature of due process negates any concept of inflexible procedures universally applicable to

every imaginable situation * * *. [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action. Where it has been possible to characterize that private interest (perhaps in oversimplification) as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required. *Id.*, at 894-895. (Emphasis added; footnote omitted.)

The instant case is plainly governed by the principles of ^{14/} Cafeteria Workers. When the FAA delegates the powers and duties of the FAA Administrator to private physicians, it is plainly engaged in an internal, administrative function -- "the Federal Government's dispatch of its own internal affairs." Cafeteria Workers, 367 U.S. at 896. Moreover, because of the extremely vital nature of the functions performed by Aviation Medical Examiners, as donee and representative of the FAA Administrator, in a position involving "trust and confidence" (*supra*, pp.3-7, 13), it is absolutely essential that the FAA retain "plenary power" over the designation of such individuals. Cafeteria Workers, 367 U.S. at 895. Nor does the FAA's failure to reappoint a private physician as an AME deprive him of "the right to follow a chosen trade or profession." Cafeteria Workers, 367 U.S. at 895-896.

^{14/}The continuing vitality of Cafeteria Workers was recently reaffirmed by the Supreme Court in Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

Petitioner is free to practice medicine at any place and in any form he desires; he is free to build a medical practice among pilots and other airmen; and he is free to continue his interest in aviation medicine. The only "loss" suffered by him is that he may not continue to enjoy the privilege of serving as the representative and delegee of the FAA Administrator and to exercise the governmental powers and duties of the Administrator.^{15/} Indeed, petitioner's "loss" falls far short of that suffered when a government employee has his job "summarily * * * revoked at the will of the appointing officer". Cafeteria Workers, 367 U.S. at 896.^{16/}

Thus, petitioner's due process claims are negated by the compelling FAA interest in exercising "plenary power" over the

15/Cf. 1 Davis, Administrative Law Treatise, §7.11, p. 454, (1958 ed.):

* * * If the President discharges a cabinet officer for singing the wrong tune on foreign policy, the officer clearly lacks a "right" to continue in his position, and therefore he is not entitled to a hearing even if he denies the facts the President sets forth in discharging him.

16/See also Medoff v. Freeman, 362 F.2d 472, 475 (C.A. 1, 1966) ("That the government has the power summarily to discharge employees, in the absence of legislation, is well established"); Jaeger v. Freeman, 410 F.2d 528, 531 (C.A. 5, 1969) ("no compelling reasons for imposing a constitutional requirement for hearing prior to the dismissal of probationary employees").

"dispatch of its own internal affairs," and the fact that petitioner is merely deprived of the privilege of acting as a representative and delegatee of the FAA Administrator, and is not deprived of "the right to follow a chosen trade or profession." These considerations not only place this case squarely within Cafeteria Workers, but also distinguish the instant case from Greene v. McElroy, 360 U.S. 474 (1959)^{17/}, and the other cases cited by petitioner where private persons were barred from exercising ^{18/} their trade or profession in civilian life.

^{17/}The Supreme Court in Cafeteria Workers, 367 U.S. at 889, specifically distinguished Greene on the ground that:

[T]he Court was unwilling to find, in the absence of explicit authorization, that an aeronautical engineer, employed by a private contractor on private property, could be barred from following his profession by governmental revocation of his security clearance without according him the right to confront and cross-examine hostile witnesses. * * * We did not reach the constitutional issues which that case otherwise would have presented. (Emphasis added.)

^{18/}E.g., Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926) (certified public accountant's right to represent clients before Board of Tax Appeals); Hornsby v. Allen, 326 F.2d 605, rehearing denied, 330 F.2d 55, 56 (C.A. 5, 1964) (applicant for liquor license, specifically distinguished from "a candidate for a state governmental office who has no right secured by the United States Constitution"); Citta v. Delaware Valley Hospital, 313 F.Supp. 301 (E.D. Pa., 1970) (private physician's right to perform operations in local hospital). Other cases cited by petitioner are not even remotely relevant. E.g., WHDA, Inc. v. F.C.C., C.A.D.C., No. 23,159, November 13, 1970 (setting forth administrative law principles governing adjudicatory hearings required by statute -- in this case, hearings to select licensee for TV channel) and Environmental Defense Fund v. Ruckelshaus, C.A.D.C., No. 23,813, January 7, 1971 (environmentalists' attack on Secretary of Agriculture's failure to suspend registration of DDT contrary to statutory requirements).

2. Petitioner cannot avoid the principles of Cafeteria Workers by arguing that "He is charged with professional dishonesty, for he is charged with placing himself in a conflict of interest situation" (Brief for Petitioner, p. 40). As petitioner himself recognizes (Brief for Petitioner, p. 3), no charges were leveled against petitioner when the FAA, on March 25, 1970, notified petitioner that "The decision has been reached that it would not be in the best interest of the Federal Aviation Administration to re-appoint you as an Aviation Medical Examiner. Accordingly your appointment which expires this month will not be renewed" (App. 24A). The specific reasons for the FAA decision not to reappoint petitioner were only given subsequently, at petitioner's insistence, and in response to Congressional inquiries apparently generated by or on behalf of petitioner (supra, pp.8-14).

Moreover, the various FAA statements elicited by petitioner and his Congressional spokesmen only expressed the FAA's eminently reasonable judgment that petitioner's consultant and testimonial activities were not consistent with the special obligations and nature of the Aviation Medical Examiner under the FAA program and that petitioner's reappointment would therefore not be in the best interest of the FAA (supra, pp.8-14). Indeed, the FAA's March 25, 1970 notification to petitioner thanked him for his "past performance that has served the needs of the agency"; and in a subsequent letter to petitioner, the FAA expressly stated that its decision not to reappoint petitioner was made "without any reflection on you" (App. 24A, 33A). Similarly, in three responses to Congressional inquiries, the FAA specifically stated that its

decision not to reappoint petitioner was taken "without any reflection on Dr. Taxay" (Supp. App. 97S, 100S, 107S).

Certainly, the FAA's comments about petitioner fall far short of bestowing "a badge of disloyalty or infamy" on petitioner. And this case is well within Cafeteria Workers, where the Court held that due process was not violated even though the government determined, without hearing, that the employee "failed to meet the particular security requirements" of the Naval Gun Factory. Cafeteria Workers, 367 U.S. at 898. See also Medoff v. Freeman, 362 F.2d 472, 476 (C.A. 1, 1966).

3. The FAA informs us that Aviation Medical Examiners have followed the practice, when they have contemplated action that might conflict with their AME responsibilities, of obtaining the views of the Regional Flight Surgeon or other appropriate FAA officials. Although any reasonable person would certainly, at the very least, have grave doubts as to the appropriateness of petitioner's conduct, petitioner never sought the FAA's views before becoming a regular consultant for an attorney representing pilots having difficulties obtaining FAA certification, or before testifying before the National Transportation Safety Board on behalf of pilots who had been denied certificates by the FAA (in one case where petitioner himself was the denying AME).

It should also be noted that, while there is no requirement in the Federal Aviation Act or Federal Air Regulations for any hearing procedure, FAA officials in the instant case did meet informally with petitioner's attorney subsequent to the March 25, 1970 decision not to reappoint petitioner (see App. 38A-39A). And

petitioner's attorney submitted for FAA consideration a five page letter setting forth the attorney's view of, and attempting to justify, petitioner's actions (App. 39A-43A). After reviewing this letter, the Federal Air Surgeon wrote that he found "no new information which would lead me to redesignate Dr. Emil P. Taxay as an Aviation Medical Examiner for the Federal Aviation Administration at this time" (App. 44A).

CONCLUSION

For the reasons stated, the petition for review should be dismissed for lack of jurisdiction, or denied.

Respectfully submitted,

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APRIL 1971

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMIL P. TAXAY, M.D.,

Petitioner

v.

JOHN H. SHAFFER, Administrator of the
Federal Aviation Administration;

PETER V. SIEGEL, M.D., Federal Air Surgeon,
Federal Aviation Administration;

HARRY M. FAULKNER, M.D., Regional Flight
Surgeon, Southern Region,
Federal Aviation Administration,

Respondents.

ON PETITION FOR REVIEW OF ACTION BY THE
FEDERAL AVIATION ADMINISTRATION

REPLY BRIEF FOR THE PETITIONER

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 14 1971

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* Cases or authorities chiefly relied on are marked by asterisks.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMIL P. TAXAY, M.D.,

Petitioner

No. 24,837

v.

JOHN H. SHAFFER, Administrator
of the Federal Aviation Administration;
PETER V. SIEGEL, M.D., Federal Air
Surgeon, Federal Aviation Administration
HARRY M. FAULKNER, M.D., Regional
Flight Surgeon, Southern Region, Federal
Aviation Administration

Respondents

ON PETITION FOR REVIEW OF ACTION BY THE
FEDERAL AVIATION ADMINISTRATION

REPLY BRIEF FOR THE PETITIONER

Issues Presented *

1. Whether this Court has jurisdiction under Section 1006(a) of the Federal Aviation Regulations [49 U.S.C. §1486(a)], to review the action of the Federal Aviation Administration whereby Petitioner was denied renewal of his designation as an Aviation Medical Examiner.
2. Whether the action of the Federal Aviation Administration in not renewing Petitioner's designation as an Aviation Medical Examiner involved an abuse of discretion in that Petitioner was not afforded the protections of due process of law.

* This case has not previously been before this Court.

ARGUMENT

POINT I

THIS COURT HAS JURISDICTION OVER
THE INSTANT PETITION FOR REVIEW
WITHIN THE MEANING OF SECTION 1006
OF THE FEDERAL AVIATION ACT OF 1958, AS AMENDED

On April 14, 1971, this Court issued its decision in International
1

Navigators Council of America v. Shaffer. By its terms, that decision
held that an assertion by the Administrator of the Federal Aviation Admin-
istration that a complaint filed against him under Section 1002 of the
2
Federal Aviation Act is outside the scope of the complaint statute does
not constitute an "order" reviewable by this Court under Section 1006 of
3
said Act.

4
As counsel for Respondents have pointed out, Petitioner asserted
that this Court's decision in the INCA case might render academic the
issue of the reviewability of the Administrator's dismissal of a Section
5
1002 complaint. This conclusion was based on a superficial knowledge
of the facts in INCA and was made without the benefit of the Court's
thinking on the jurisdictional issue involved.

After an in-depth study of the text of the INCA decision, Petitioner
submits that it is not controlling on the instant case. It is hoped the

1. No. 24,302 (D.C. Cir., April 14, 1971).
2. 49 U.S.C. § 1482(a) (1964).
3. 49 U.S.C. § 1486(a) (1964). See INCA, supra, Slip Op. at 9.
4. Brief for Respondents, at 23.
5. Brief for Petitioner, at 21-22.

Court will agree that the facts of the respective cases are distinguishable and that the Administrator did issue an "order" in the instant case that is reviewable under Section 1006 of the Act. As a predicate to argument on this point, Petitioner respectfully asks the Court to review the following pertinent facts. After several months of fruitless attempts to present his views to the Federal Aviation Administration and to learn the specific reasons for his dismissal from service as an Aviation Medical Examiner, Petitioner filed a complaint with the Administrator
¹ on July 8, 1970. Obviously, Petitioner did not have, at that time, the benefit of this Court's insight into the scope of Section 1002 of the Act. Rather, as is shown by the relief requested in said complaint, Petitioner was seeking further review at the administrative level of the action taken initially by Dr. Harry M. Faulkner, the Regional Flight Surgeon, and affirmed on reconsideration by Dr. Peter V. Siegel, the
² Federal Air Surgeon. Specifically, Petitioner requested the Administrator to compel the Federal Air Surgeon to renew Petitioner's designation as an Aviation Medical Examiner or, in the alternative, to conduct
³ his own investigation into the matter by holding an evidentiary hearing.

1. Appendix, at 2A.
2. Letter from Dr. Faulkner informing Petitioner that his designation as an AME would not be renewed (Appendix, at 24A) and letter from Dr. Siegel affirming Dr. Faulkner's action (Appendix, at 44A).
3. Appendix, at 16A.

Contrary to Respondents' argument regarding a supposed "boot-¹ strap" attempt to create jurisdiction in this Court, the filing of this Complaint marked Petitioner's good faith attempt to exhaust all administrative remedies which, at the time, seemed available to him. As noted previously, Petitioner did not have the benefit of this Court's interpretation of Section 1002 of the Act. Furthermore, his decision was influenced by the well-known requirement that all avenues of administrative review be explored before judicial review of an administrative action can be sought successfully.

More importantly, the factual development in the INCA case was drastically different from that of the instant case. Petitioner in INCA first brought his case to the District Court in an attempt to secure a temporary restraining order. Both that and its subsequent attempt to obtain a preliminary injunction were unsuccessful. Only after failing ² in the District Court did INCA petition for review by this Court. INCA was never a licensee of the Federal Aviation Administration. In retrospect, it can be seen that it had to utilize a Section 1002 complaint to attempt to obtain review by this Court under Section 1006 of the Act. Your Petitioner in the instant case never had to resort to such tactics to manufacture jurisdiction in the Court. He was a designee of the Federal Aviation Administration. That designation was removed under the terms of

1. Brief for Respondents, at 21.
2. INCA, supra, Slip Op. at 8.

1
a letter from Dr. Harry Faulkner, dated March 25, 1970, that in all
2
respects constituted an order of the Administrator. This action was
3
confirmed by the Regional Counsel for the FAA's Southern Region, by
4
the Director of the Southern Region, by the Federal Air Surgeon, and
5
6
by the Administrator. As noted above, your Petitioner utilized the
vehicle of a Section 1002 complaint in a good faith attempt to exhaust
administrative remedies, as opposed to resorting to obtaining bootstrap
jurisdiction.

Petitioner had further reason to seek review by the Administrator. At the time of his filing of the complaint (July 8, 1970), Petitioner was well aware that no meaningful record had been developed. Correspondence from the Federal Aviation Administration up to that time concerning this matter was noticeably lacking in specifics regarding the actual reasons for the refusal of the FAA to renew Petitioner's designation as an Aviation Medical Examiner. Nor had the Petitioner been given any real opportunity to express his own views or offer his own

1. Appendix, at 24A.
2. The Court is respectfully asked to refer to argument applicable to this point, infra, at 12.
3. Appendix, at 28A, 31A.
4. Ibid., at 34A.
5. Ibid., at 32A, 44A.
6. Ibid., at 36A.

explanation of his conduct as a designee of the Administrator. Thus,
the entire record before the FAA as of July 8, 1970, consisted of a
series of letters, most of which were vague.

It is submitted that Petitioner felt constrained by the sparsity
of this record to seek a further opportunity at the administrative level
to develop a record that would lend itself to subsequent judicial review
should that eventuality come to pass. The request for an investigative,
evidentiary hearing contained in his Section 1002 complaint ¹ was
designed to afford him the opportunity to build such a record. It
seemed obvious at the time that the existing record was insufficient
for meaningful review by a court of competent jurisdiction.
²

Thus, your Petitioner sought out the Administrator, the agency
official ultimately responsible for such decisions, and asked him to
review the decision of his subordinates not to renew Petitioner's designation
as an Aviation Medical Examiner. The document, styled as a
Section 1002 complaint, urged the Administrator to investigate all the
circumstances surrounding the original agency decision. In a very
real sense, despite its title, this document constituted a request by an

1. See Appendix, at 39A. This letter represents the only opportunity granted to Petitioner by the FAA to present his own position. It was performance deficient because of the failure of the FAA to specify the reasons for its action prior to the date of the letter (May 21, 1970).
2. Appendix, at 16A.

individual who was vitally affected by an agency action involving his individual status that the administrative official who bore the ultimate responsibility for that action reconsider the decision.

The Court is urged to note that, in contrast, the petitioner in the INCA case, supra, sought, through its Section 1002 complaint, the initiation of rule making proceedings involving a costly navigational system already in use by many of the transoceanic commercial air carriers. The relief sought would have rescinded authorizations for use of this particular navigational system which had been previously issued and would have suspended all pending application for such ¹ authorizations. The financial and technical impact of the requested relief, had it been granted, would have been staggering. This is quite distinct from the individual nature and limited impact of the relief sought by your Petitioner in the instant case.

From the point of view of the jurisdictional issue raised by ² Respondents herein, of even greater importance is the response of the Administrator to the Section 1002 complaints filed in the respective cases. In the INCA situation, from the very outset, the Administrator

1. INCA v. Shaffer, supra, Slip Op. at 6.
2. Brief for the Respondents, at 1, 17-23.

refused to issue an order and sought to treat that complaint as a
petition for rule making.¹ He made his position very clear, through
a letter from FAA's General Counsel, which denied reconsideration
of the dismissal of the complaint "because the agency was of the
opinion that Section 1002 'does not provide for, nor require, the
issuance of the kind of order requested in the complaint....'" Thus,
the Administrator raised the jurisdictional question concerning the
scope of his powers under Section 1002 of the Act when the case was
first presented to the agency. It is submitted that the Administrator's
treatment of the Section 1002 complaint filed in the instant case was
critically different.

The Administrator responded to your Petitioner's complaint by
letter dated October 23, 1970.³ From the terms of that letter, it is
submitted that the Administrator chose to deal with the merits of
Petitioner's claim. By its very words, this letter shows that the Admin-
istrator reviewed the documentary evidence available and reached an
independent conclusion on the question of whether Petitioner's desig-
nation should be renewed. The Administrator stated that he referred

1. See the Administrator's letter of March 6, 1970, quoted in INCA, supra, Slip Op. at 6-7.
2. INCA, supra, Slip. Op. at 7.
3. Appendix, at 1A.

the document and, one must suppose, the correspondence attached thereto to an independent office for consideration. Based on his own review of the complaint and that office's report, the Administrator concluded that there was no reasonable basis for reversal of the initial agency decision. With regard to Petitioner's request for an investigative, evidentiary hearing, the Administrator stated that the complaint did not contain facts which would warrant such further investigation. It is submitted that, in order to reach such conclusions, the Administrator had to consider the merits of Petitioner's claim.

The Court is asked to note the fact that the Administrator dealt with the merits of Petitioner's claim in the instant case over six months after taking the position vis a vis INCA that he had no jurisdiction to deal with a Section 1002 complaint directed against himself. It is submitted that the Administrator must have known that such a procedure was available to him in the instant case. The fact that instead he chose to issue a decision on the merits of Petitioner's claim is one major reason that that decision should be treated as a reviewable order.

1. Appendix, at 1A.
2. Ibid.
3. By letter of April 9, 1970, FAA's General Counsel, acting for the Administrator, notified INCA that the Administrator was not empowered to act on such a complaint. INCA, supra, Slip Op. at 7.

It is hoped the Court will agree that the Administrator's
1
letter of October 23, 1970, as described above, fits the definition
of a reviewable order expressed by this Court in a number of its recent
cases. The test to which this Court has subscribed might be summa-
rized as whether an administrative action operates with final effect
2
upon a particular individual, entity or group. Petitioner respectfully
refers the Court to argument on this point contained in his Brief at
19-22, and, insofar as applicable incorporates that argument herein
by this reference. There can be no doubt that the Administrator's
action has had a final effect on Petitioner. His designation as an
Aviation Medical Examiner has clearly been finally terminated by the
official of the Federal Aviation Administration who has the final or
3
ultimate authority under the Regulations which govern.

In addition to raising this issue concerning the scope of
Section 1002 of the Federal Aviation Act, Respondents have argued
that no direct Court of Appeals review of the Administrator's internal,

1. Appendix, at 1A.
2. Environmental Defense Fund v. Ruckelshaus, No. 23,813
(D.C. Cir. January 7, 1971); Medical Committee for Human
Rights v. Securities and Exchange Comm., ____ U.S. App. D.C.
____, 432 F.2d 659 (1970); Pan American World Airways, Inc. v.
Civil Aeronautics Board, 129 U.S. App. D. C. 159, 329 F.2d 483
(1968).
3. Section 183.15 of the Federal Aviation Regulations [14 C.F.R.
§ 183.15].

administrative actions is provided in Section 1006 of the Act. In support of this argument, Respondents assert that various sections of the Federal Aviation Act require that orders of the Administrator must set forth findings of fact. However, it is noted that no findings of fact are required in the case of internal administrative actions taken by the Administrator. Therefore, the Respondents argue, since no findings of fact are required for internal administrative actions, such actions cannot be deemed orders, within the meaning of Section 2

1006. This outstanding example of circular reasoning completely misses the point of recent pronouncements of this Court which are rooted in irrefutable Supreme Court decisions. Based on those decisions, it is essential, in all fairness to the Petitioner, to cut through the mere form of action taken by the Administrator and to consider the 3 true purpose and effect of that action. This is the true meaning of 4 those cases, already referred to, which hold that a reviewable order is an administrative action which operates with final effect upon an individual. The determining factor is not the label which the agency

1. Brief for Respondents, at 20-21.
2. Brief for Respondents, at 19, 21.
3. See Columbia Broadcasting System, Inc. v. U.S., 316 U.S. 407, 416 (1942); American Federation of Labor v. NLRB, 308 U.S. 401, 408 (1940); Powell v. U.S., 300 U.S. 276, 285 (1937).
4. See footnote 2, page 9, supra.

places on its action; it is the effect that action has upon the interested party.

In the instant case, the Administrator's letter of October 23,¹ 1970, terminated consideration of your Petitioner's case by the Federal Aviation Administration. It announced that the Administrator has upheld his subordinates' decisions to refuse to renew Petitioner's designation as an Aviation Medical Examiner, a position in which he had invested nearly nine years of interest and activity that apparently had been satisfactory. Thus, it denied to him the opportunity to practice a form of medicine from which he derived great personal satisfaction, as well as a relatively substantial income. Finally it is necessarily implied that the entire hierarchy of the Federal Aviation Administration believed that Petitioner had engaged in some form of ethical misconduct. The Administrator's letter had all these substantial effects on Petitioner's professional life despite the fact that Petitioner was never given a realistic or adequate opportunity to present his own views to the agency.² Certainly the Administrator's action of October 23, 1970, had a substantial enough effect on Petitioner to be considered an order reviewable by this Court under Section 1006 of the Federal Aviation Act.

1. Appendix, at 1A.
2. Respondents argue that Petitioner was given such an opportunity (Brief for Respondents, at 29-30). The meeting and subsequent letter noted therein were patently insufficient. Petitioner has already discussed this point (Brief for Petitioner, at 15-16, 51-52) and will not burden the record further.

Should the Court consider its holding in the INCA case, supra, as binding under the circumstances of the instant case, it is respectfully submitted that a reasonable alternative is available. Based on that decision, it is clear that Petitioner erred in designating his appeal to the Administrator as a complaint under Section 1002 of the Act. However, if the court chooses to treat the Administrator's action on this complaint in the same way as it treated the Administrator's dismissal of the INCA complaint, an adequate basis remains for jurisdiction. Because the Federal Air Surgeon's affirmance of the Regional Flight Surgeon's decision ¹ operated with the same final effect on Petitioner as has already ² been discussed, it too could be considered an order of the Administrator. The reasons for so considering this action by the Federal Air Surgeon are the same as those just discussed and need not be repeated.

Petitioner recognizes that in order for the Court to follow this course of action it would have to waive the sixty (60) day filing period required by Section 1006(a) of the Act [49 U.S.C. § 1486(a)]. As good cause for such waiver, if it is required, Petitioner respectfully submits that there was no way he could have known of this Court's interpretation of Section 1002 of the Act in time to avoid filing his complaint under that Section or within sixty (60) days of June 10, 1970.

1. Letter of Peter V. Siegel, M.D., dated June 10, 1970, (Appendix at 44A).
2. See Brief for Petitioner, at 9-10, regarding the delegation of this authority to the Federal Air Surgeon by the Administrator.

It is submitted that the foregoing establishes that this Court does have jurisdiction under Section 1006(a) of the Act [49 U.S.C. §1486(a)] to review the action of the Federal Aviation Administration in refusing to renew Petitioner's designation as an Aviation Medical Examiner. Such review could be on the merits of the case; but the Court is asked to recall Petitioner's argument that the sparseness ¹ of the record in this case precludes effective review on the merits. Therefore, Petitioner has asked the Court to remand the case to the FAA for a hearing at which a full record could be developed. Furthermore, Petitioner has alleged that he was entitled to the opportunity to defend himself at such a hearing. Thus, the Court is left with the further question of whether the procedures followed by the Administrator in deciding not to renew Petitioner's designation as an Aviation Medical Examiner involved an abuse of discretion.

1. Brief for Petitioner, at 22.

POINT II

THE ACTION OF THE FAA IN REFUSING
TO RENEW PETITIONER'S DESIGNATION
AS AN AVIATION MEDICAL EXAMINER
WAS AN ABUSE OF DISCRETION

The arguments raised by Respondents regarding the statutory
1 and regulatory grant of discretion have already been covered in
2 Petitioner's Brief. However, Respondents also rely on Cafeteria
and Restaurant Workers v. McElroy, 367 U.S. 886 (1961) in an effort
3 to discredit Petitioner's due process argument.

Briefly stated, Respondents argue that the Federal Aviation Administration's "compelling" interest in exercising plenary power over the dispatch of its own internal affairs, such as the designation of Aviation Medical Examiners, negates Petitioner's right to administrative due process. Supposedly, the principles of Cafeteria

1. Brief for Respondents, at 23-24.
2. Brief for Petitioner, at 31-53. The Court is asked to recall that the main thrust of Petitioner's argument is that Section 183.15 of the Federal Aviation Regulations [14 C.F.R. § 183.15] purports to give the Administrator unbridled discretion with respect to the designation of Aviation Medical Examiners. It was submitted that, under applicable case law as applied to the circumstances of the instant case, this discretion was limited by the requirement for a trial-type hearing. Therefore, failure of the FAA to grant Petitioner such a hearing at some point in the proceedings below constituted an arbitrary abuse of discretion.
3. Brief for Respondents, at 24-29.
4. Brief for Respondents, at 26-27.

Workers, supra, require such a finding on the circumstances of the
1
instant case.

It is submitted that the instant case can and should be distinguished from Cafeteria Workers, supra. In that case, the Security Officer of the Naval Gun Factory in Washington, D. C. determined that a short order cook employed in the cafeteria facilities which served the factory failed to meet the security requirements of the installation. His decision was affirmed by the factory's Superintendent. At no time was the cook allowed a hearing or even a meeting with the authorities at the factory. As a result, the cook could no longer be employed at that cafeteria. The cafeteria was operated by a private company pursuant to a contract which provided that the cafeteria could not employ personnel who failed to meet the security requirements of
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the institution. The Supreme Court noted that the factory "was engaged in designing, producing, and inspecting naval ordinance, including
3
the development of weapons systems of a highly classified nature." The Court granted certiorari, "because of an alleged conflict between the Court of Appeals' decision and Greene v. McElroy, 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377, 364 U.S. 813, 81 S. Ct. 43, 5 L.Ed.
4
2d 44."

1. Brief for Respondents, at 25.
2. Cafeteria Workers, supra, at 888.
3. Ibid., at 887.
4. Ibid., at 889.

The distinction between the instant case and Cafeteria Workers that first comes to mind is the nature of the governmental interests involved. In Cafeteria Workers, navy officers were concerned with preservation of security at a "sensitive military" installation. The "compelling" nature of this interest is obvious. On the other hand, based on what can be gathered from the correspondence in the instant case, the Administrator was concerned with maintaining a system of Aviation Medical Examiners who would not question the medical basis for decision ¹ made by his physician-employees. It is difficult to imagine what interest the public, whose welfare the Administrator is charged to protect, ² could possibly have in the maintenance of such a system. Rather, it is submitted that the public is best served by Aviation Medical Examiners who possess enough professional integrity to question continually their own and others medical judgments in search of medical "truth".

The second distinction between the instant case and Cafeteria Workers is the nature of the private interests involved. As the Supreme Court noted, the cook in Cafeteria Workers was denied only the "opportunity to work at one isolated and specific military installation." ³

1. See Brief for Petitioner, at 52-53.
2. See Section 103, Federal Aviation Act of 1958, as amended (49 U.S.C. § 1303).
3. Cafeteria Workers, supra, at 896.

Her right to follow a chosen trade or profession was not precluded, as she "remained entirely free to obtain employment as a short order cook..." with whomever she chose. The opportunity denied to your Petitioner is much broader in scope, and its denial much more serious in impact.

The Aviation Medical Examiner program of the Federal Aviation Administration is, to counsel's knowledge, the only available civilian program involving the practice of aviation medicine on such a broad scope. The FAA trains these men and requires them to become involved with many areas of aviation medicine, including pilot physicals, the air traffic controller health program, and accident investigation. In a very real sense, the Administrator's control of this program involves control of an "entire branch" of the profession. To argue, as do the Respondents, ¹ that Petitioner has lost very little by his dismissal from this program really begs the question. In fact, he has lost the opportunity to participate in one of the largest, most vital, and most responsible programs extant in the field of aviation medicine. The Supreme Court itself recognized the distinction in private interest that exists between ² a short order cook and such a professional as a lawyer or physician. ³ While the cook in the Cafeteria Workers case could work as a cook anywhere, your Petitioner has no other opportunity to perform the duties of ⁴ an Aviation Medical Examiner.

1. See, generally, "Guide for Aviation Medical Examiners," Supplementary Appendix, at 109 S, et seq.
2. Cafeteria Workers, supra, at 896.
3. Brief for Respondents, at 26.
4. Cafeteria Workers, supra, at 896.

Respondents argue that Petitioner has not been wronged by the decision not to renew his designation because "no badge of dis-
loyalty or infamy" ¹ ² has been bestowed upon him. Despite this argument, the fact remains that Petitioner has been charged by the FAA with engaging in an ethical conflict of interest. Such a charge, made without the opportunity for a defense, is particularly grievous when applied to a physician, a professional person, whose reputation is of as much value to him as his professional skills. Surely Cafeteria Workers does not stand for the proposition that a man must be charged with actively seeking the overthrow of the Government before he is granted the opportunity to defend himself. Surely the true test should be the effect of the particular charge on the particular individual involved. It is hoped the Court will agree that the effect of the FAA's charge on your Petitioner, a physician, is of a serious nature.

While it obviously cannot be said that the Administrator's action has denied Petitioner the right to practice medicine in general, it has denied him the opportunity to practice in a particular area of medicine to which he has dedicated a substantial portion of his professional life. Because of Petitioner's lengthy involvement with the Aviation Medical Examiner program (nearly nine years of satisfactory activity), his

1. Cafeteria Workers, supra, at 898.
2. Brief for Respondents, at 28-29.

designation as such became more than the "mere privilege" alleged
1 by Respondents. It is submitted that each year spent as an AME
lessened the "privilege" nature of his position. For example, increasing
numbers of pilot-patients came to rely on his availability to conduct
the physical examinations on which their medical certificates depended.
Furthermore, the Supreme Court has told us that such a "privilege"
argument has little validity in a situation where, as here, administrative
2 action has been arbitrary.

The Supreme Court discusses at some length the degree of discretion granted to the Superintendent or commanding officer of a military
3 installation. We are told that the power of a commanding officer over
a military reservation is "necessarily extensive and practically exclusive."
4 Petitioner respectfully asks the Court to determine whether the Respondents have provided any references to statutes, regulations, case law, or logic which show that the Administrator has been granted or even needs such a degree of power and discretion in his conduct of the Aviation Medical Examiner program. It is hoped the Court will agree that whatever discretion

1. Brief for Respondents, at 25, 27.
2. Wieman v. Updegraff, 344 U.S. 183, 192 (1952).
3. Cafeteria Workers, supra, at 891-894.
4. Ibid., at 893.

the Administrator has been granted in this regard has been limited by the requirement in recent case law that it be a reasoned discretion based on an analysis of the pertinent facts.¹

It is clear that the Supreme Court in the Cafeteria Workers case balanced the competing interests of the parties. As the Court noted:

...consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. ²

Respondents have argued that because no constitutional right exists to a designation as an Aviation Medical Examiner, Petitioner suffered no loss when he was denied the protections of due process. The Supreme Court was unwilling to accept such an "easy assertion". Rather, that Court engaged in a much more exhaustive analysis and comparison of the interests involved than Respondents seem willing to undertake.³

1. Rather than repeat arguments already made, Petitioner respectfully refers the Court to discussion on this point contained in Brief For Petitioner, at 44-48.
2. Cafeteria Workers, supra, at 895.
3. Brief for Respondents, at 26.
4. See Cafeteria Workers, supra, at 894.
5. See Brief for Respondents, at 25-27..

Even though the Cafeteria Workers Court found that the balance weighed in favor of the Government, it recognized that "... governments, even in the exercise of their internal operations, do not constitutionally ¹ have the complete freedom of action enjoyed by a private employer."
The Court tells us that the short order cook in that case could not have been excluded from the Gun Factory without notice and hearing if the ² grounds for that action had been arbitrary or discriminatory. It is submitted that the Supreme Court found no need for a hearing in Cafeteria Workers because, based on the amount of discretion given to him, and the relative interests of the parties, the Superintendent of the Gun Factory could not be found to have acted in an arbitrary manner.

Applying the same "balancing of interests" test used by the Supreme Court in the Cafeteria Workers case, it is clear that Petitioner in this case is entitled to the hearing that is required by due process. He has been denied access to a portion of his profession in which he had invested nearly nine years of effort. He has been branded as the type of physician who would willingly engage himself in a conflict of interest situation. Yet, as has been demonstrated, these unfortunate results have

1. Cafeteria Workers, supra, at 898. See United Public Workers of America (C.T.O.) v. Mitchell 330 U.S. 75 (1947); Wieman v. Updegraff, supra.
2. Cafeteria Workers, supra, at 898.

accrued to Petitioner through administrative action that was both an abuse of discretion and arbitrary. This action was taken in spite of the fact that Petitioner had no opportunity to learn the specific nature of the charges against him nor the identity of his accusers, no opportunity to cross-examine those accusers, and no opportunity to rebut or explain whatever evidence the FAA possessed. It is submitted that for these reasons, Petitioner is entitled to some procedures where-
by he might defend himself against these accusations.

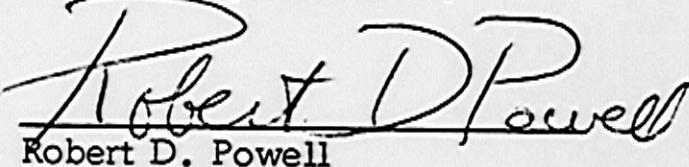
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1. The many distinctions discussed in this section show that the instant case is more in line with Greene v. McElroy, supra, than with Cafeteria Workers, supra. See Brief for Petitioners, at 33-37.

CONCLUSION

For the reasons stated, Petitioner respectfully urges the Court to assume jurisdiction over his Petition for Review and to reverse the order of the Federal Aviation Administration whereby Petitioner was denied renewal of his designation as an Aviation Medical Examiner. If, as Petitioner suspects, the Court finds that the record is insufficient for the Court to reach a decision on the merits, the Court is respectfully requested to remand the case to the FAA with instructions that that agency shall grant Petitioner a fair and open hearing. It is further requested that the Court retain jurisdiction over the matter for the purpose of further review.

Respectfully submitted,


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May 14, 1971

202/296-0600

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing "Reply Brief For Petitioner" were served by hand this 14th day of May, 1971, on:

Leonard Schaitman, Esq.
Room 3712
Department of Justice
Washington, D. C.

/s/ William H. Roberge, Jr.
William H. Roberge, Jr.